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IN THE

Supreme Court of the United States

October Term, 1973

No. 73 - 396

WALLACE REED, *et al.*, *Petitioners,*

vs.

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*, *Respondents.*

UNITED STATES OF AMERICA, *Respondent,*

vs.

HOOD CORPORATION, *et al.*, *Petitioners.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA, *Respondent,*

vs.

HOOD CORPORATION, *et al.*, *Petitioners.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Ollie Mae Shearman, the Estate of Charles Shearman, deceased, Hood Corporation, Hood-co Farms, Inc., Virginia Agricultural Products Corp., Indian Hill Irrigation Company, Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze, Raymond T. Michener and Marjorie K. Michener, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 4, 1973.

Opinions Below.

1. The first of many decisions involved in these proceedings was rendered by the Director of the Bureau of Land Management of the Department of Interior on August 14, 1964, wherein contests theretofore filed against pending applications for entry on desert lands were dismissed (Appendix A).

2. On May 25, 1966, the Chief Hearing Examiner for the Department of Interior issued a recommended decision (72 I.D. 386) reaching opposite conclusions from those of the Director on each issue. This decision was adopted by the Secretary of the Interior on December 30, 1966 (73 I.D. 386) (Appendix B).

3. There was no reported decision States District Court for the District of Idaho other than the Preliminary Decision filed on March 13, 1970 (Appendix C) and the Findings of Fact and Conclusions of Law (Appendix D) and Judgment (Appendix E) filed on July 10, 1970.

4. The opinion of the United States Court of Appeals reversing the District Court for the Ninth Circuit was entered on June 4, 1973, not yet reported (Appendix F).

5. The Order denying a Petition for Rehearing en banc was entered on July 27, 1973 (Appendix G).

Copies of the foregoing decisions and orders are filed herewith in a separate Appendix.

Jurisdiction.

1. The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 4, 1973, reversing a Judgment for the petitioners entered by the United States District Court for the District of Idaho on July 10, 1970.

2. The order denying petitioners' timely Petition for Rehearing was entered July 27, 1973.

3. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review.

1. Whether the decision of the Court of Appeals for the Ninth Circuit (which decision is in clear conflict with its own prior decisions, decisions from other circuits and decisions of this Court) correctly interprets the Desert Land Act of 1877 as amended.

2. Whether the Secretary of the Interior is bound by the Administrative Procedure Act and the regulations of the Department of Interior, or whether he may properly ignore a final decision of the Department and arbitrarily order a new hearing.

3. Whether the Court of Appeals has read into the Desert Land Act requirements which the Congress did not intend.

4. Whether the District Court was correct in holding that the Secretary of Interior capriciously exceeded his authority in cancelling seven desert land entries that had not ripened into patents.

5. Whether the District Court was correct in holding that the Government had failed to prove fraud in its attempt to set aside patents.

Constitutional Provisions, Federal Statutes and Regulations Involved.

The following applicable constitutional provisions, Federal statutes and regulations are set forth in the incorporated Appendix:

1. Amendment V to the Constitution of the United States.
2. 5 U.S.C. §§552, 554, 701, 702 and 706.
3. 28 U.S.C. §1345.
4. 43 U.S.C. §§321, 324, 327, 328 and 329.
5. 43 C.F.R. 1843.9, 1844.1 and 2521.4(d).

Statement of the Case.

The District Court had jurisdiction to review a decision of the Secretary of Interior under the provisions of the Administrative Procedure Act (5 U.S.C. 701, *et seq.*) and to hear and determine an action whereby the Government sought to recover the title to and possession of lands (28 U.S.C. 1345).

The issues are of the utmost importance in that their resolution will determine whether millions of acres of federally-owned land are to lie fallow or whether they are to be rendered productive as envisioned by the Congress when the Desert Land Act of 1877 was adopted.

At this stage, the most accurate and concise statement of the case is found in the Findings of Fact of the District Court. They appear in their entirety in Section D of the separate Appendix. For convenience, the Findings, all clearly supported by the record, are summarized below.

In early 1961, Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, Blaine L. Garn, Wallace Reed, Joseph Nielsen, Robert R. Schwarze, Myrtle M. Reed and George L. Crapo applied for entry on lands located on the Indian Hill plateau in Owyhee County, State of Idaho.

On March 7, 1961, the Indian Hill Irrigation Company, a corporation, was formed to further the effort of obtaining irrigation facilities and the water necessary to irrigate the desert entries.

After attempting for almost two years to obtain a small projects loan from the Bureau of Reclamation and after numerous unsuccessful attempts to obtain financing for the development of the entries, the entrymen were able to make arrangements with Hood Corporation to provide interim financing thus enabling them to commence development. Initial contact with Hood Corporation was with Charles Shearman, an officer and major stockholder, on Feburary 15, 1963. Hood Corporation installed gas lines for the Intermountain Gas Company in Idaho and therefore was interested in establishing the feasibility of using natural gas engines for pumping water in high lift irrigation projects. Mr. and Mrs. Shearman also filed applications for entry.

Hoodco Farms, Inc. ("Hoodco"), an Idaho corporation, was incorporated on August 5, 1963 and on August 15, 1963 entered into agreements with the entrymen to develop the lands as necessary to obtain patents. By the agreements, Hoodco undertook to perform necessary development work on the individual entries to make them eligible for patent for $200.00 per developed acre. Simultaneously, each entryman entered into agreements with Indian Hill Irrigation Company whereby the irrigation company was to construct the

necessary joint irrigation works for $100.00 per developed acre. The latter agreement, though made August 15, 1963, was dated as of February 19, 1963, and superseded all previous contracts for the development of the project. Under its agreement, Hoodco was given the right to farm the land until full payment of the construction costs provided that so long as Hoodco farmed the land, an amount equal to one-twentieth of the cost of development would be credited annually against the obligations to Hoodco. The obligations of the entrymen to Indian Hill Irrigation Company under the February 19, 1963 agreement were also to be paid. The payment to Hoodco and Indian Hill Irrigation Company was evidenced by promissory notes and secured by mortgages which provided that there would be no recourse against the individual entryman for deficiency. The individual entryman could prepay the balance at any time and take over the full operation and control of his entry. Although the development of the entire project was made on a joint and cooperative basis, the irrigation system was so designed that each entry could be separately farmed and irrigated. Thus, the entrymen were able to obtain the financing to develop the land and to lease the land in order to meet the payments as they came due to Hoodco and Indian Hill Irrigation Company. The financing arrangement made it possible for Hoodco and Hood Corporation to recoup monies expended and to be expended in the development and furthered the business purpose of Hood Corporation to use the project to demonstrate the feasibility of gas engines on irrigation projects.

Prior to the issuance of patents, no contract was made by any of the entrymen for the sale of any of the entries involved.

All acts done by the entrymen, in the steps taken to acquire patents were done in good faith, and the final proof documents submitted were proper and complete and disclosed all information required by law. All requirements of the Desert Land Laws were met including, without limitation, water supply, cultivation, adequacy of irrigation systems and expenditures.

Charles R. Shearman died on April 27, 1964 and his widow, Ollie Mae Shearman, was appointed his Executrix.

On September 26, 1963, final proofs for the issuance of patents were filed by Messrs. Reed, Nielsen, Schwarze, Crapo and by Myrtle Reed.

On July 2, 1964, a contest was filed with the Department of Interior seeking to cancel the entries as having been obtained and held in violation of the Desert Land Act. The contest was grounded on the contention that the parties did not have the requisite intent, had not made the necessary expenditures in the development and reclamation of their entries, the arrangements between the entrymen and Hoodco constituted proscribed assignments, and the arrangements with Hoodco resulted in a holding of more than 320 acres.

By stipulation, properly entered into by counsel, the matter as to all entrymen except the Shearmans was presented through an agreed statement of facts and documentary evidence. No question has been raised as to the authority or propriety of government counsel to enter into a binding stipulation. The record includes a proposed supplemental agreement between the entrymen and Hoodco by which the entrymen and Hoodco undertook, if necessary, to clarify the agreements in effect. The entrymen further offered to consider any other modifications that might be proposed by the Government.

On August 14, 1964, the Director of the Bureau of Land Management acting for the Secretary, issued a decision favorable to the entrymen as to all issues without requiring or suggesting any modifications in the contractual arrangements then in existence. The decision was publicly applauded in a news release by the Secretary.

Thereafter, on September 4, 1964, the contests then pending against the Shearman entires were also dismissed based on the decision of August 14, 1964. No appeal was taken from the decision, nor from the order dismissing the contests against the Shearman entries.

Pursuant to the decision, patents were issued to Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze and George L. Crapo on September 3, 1964. In reliance upon the decision, Hoodco, Indian Hill Irrigation Company and the remaining entrymen continued to develop the entries at substantial expense.

On November 25, 1964, final proofs were filed by Messrs. Michener, Barnes, Garn, Marjorie Michener and Norma Barnes. On January 12, 1965, final proofs were filed on the Shearman entries.

On January 19, 1965, George L. Crapo and Melba O. Crapo, his wife, gave Virginia Agricultural Products, a corporation, an option to purchase the lands included in the Crapo entry. A warranty deed was executed on January 19, 1965 conveying these lands to Virginia Agricultural Products and was deposited in

escrow on January 22, 1965. The warranty deed was recorded on September 24, 1969.

On April 5, 1965, the solicitor of the Department of Interior in what the District Court termed "a most unusual and unprecedented action" issued an opinion which recited that it was unsound policy to dismiss the contest on the basis of the stipulated record, and further recited that even if the facts disclosed in the stipulated record were true, the Director's decision was incorrect on the law. This opinion was transmitted to the Secretary of Interior without notice to the entrymen. Thereafter, the Secretary of Interior issued an order directing that the decision of August 14, 1964 be set aside and that new proceedings be instituted.

Thereafter, complaints were again issued against Ollie Mae Shearman and the estate of Charles Shearman, deceased, and the complaints originally filed against the other entrymen were amended and a notice was issued to the patentees directing them to appear and present evidence with respect to the charges that their patents had been fraudulently obtained. The complaints embodied essentially identical charges to those that had been made in the 1964 contest proceedings.

On September 3, 1965, George L. Crapo and Melba O. Crapo executed a quitclaim deed to the United States of America covering their entry. The deed was recorded on March 22, 1968.

Prior to September 3, 1965, the Department of Interior was informed of the deed to Virginia Agricultural Products.

After lengthy hearings before a Hearing Officer of the Department of the Interior in 1965, opposite legal conclusions were reached, on an almost identical set of facts from those originally reached by the decision of August 14, 1964. On December 30, 1966, the Secretary of the Interior rendered a new decision cancelling the seven unpatented entries and directing that proceedings be taken to cancel the existing patents for fraud.

When the Secretary purported to set aside the September 14, 1964 decision, the only steps remaining for the issuance of patents were the ministerial acts of execution and delivery of patents, all of the statutory steps required for the irrigation and cultivation of the lands having been completed.

In January, 1968, Charles E. Barnes and Vera M. Barnes, husband and wife, Norma E. Barnes and Blaine Garn executed quitclaim deeds to the United States covering the lands included in their entries. They were recorded on August 14, 1968.

All of the mortgages entered into with Indian Hill Irrigation Company and Hoodco were recorded prior to September 3, 1965.

The issues now before this Court were presented to the United States District Court for the District of Idaho in two separate actions. In the first action (Civil Case No. 1-65-86), petitioners contended that the Secretary's decision of December 30, 1966 was erroneous, that the decision of August 14, 1964 was final and binding, and sought an adjudication establishing that the five

patents had been properly issued and that patents should promptly issue on the other seven entries.

The United States brought a separate action (Civil Case No. 1-67-97) seeking to have the petitioners ejected from the lands and a determination quieting title in the United States. The Government further sought approval of the decision of December 30, 1966 and prayed that the patents be set aside for fraud.

Both actions were consolidated for trial and it was stipulated that the entire administrative record was to be part of the trial record and considered by the trial court.

After preliminary rulings on specified legal issues on July 2, 1969, the actions were tried in the District Court of Idaho, Southern Division, on October 20 through October 24, 1969. After extensive briefing and further oral argument, judgment was entered July 10, 1970 dismissing the Government's complaint, ordering patents to issue to the entrymen and holding that the patents previously issued were free and clear from any claim of the United States.

The District Court further found:

(a) There is no procedure in the Department of the Interior or within the Federal statutes or regulations giving the Secretary of Interior the power to set aside the decision of August 14, 1964 or to conduct further proceedings.

(b) The actions of the Secretary were arbitrary, capricious and constituted an abuse of discretion and denial of due process of law.

(c) The rights of the entrymen constituted valuable property rights.

(d) Each entryman had the intention to reclaim the land for his own use and benefit at the time of the filing of his application for entry and at all times thereafter maintained the intent required by law.

(e) The contractual arrangements between Hoodco, the entrymen and Indian Hill Irrigation Company did not constitute assignments of the entries to Hoodco but represented a legal and proper financing plan for the joint development of the entries.

(f) As a result of said contractual arrangements, Hoodco became a mortgagee in possession of the lands and did not hold them in the capacity of an entryman.

(g) The quitclaim deeds were subject to all valid existing liens and encumbrances including the mortgages in favor of Indian Hill Irrigation Company and Hoodco.

REASONS FOR GRANTING THE WRIT.

The Writ should be granted for the following reasons:

1. The decision below is in clear conflict with other decisions of the Ninth Circuit as well as those of the Eighth Circuit and of this Court in determining what is necessary to obtain title to land under the Desert Land Act. Although these cases appear to affect only approximately 4,000 acres in Idaho, in fact, millions of acres of federally-owned land in the western part of the United States are directly affected by these proceedings. Since the issuance of the decision of the Secretary of Interior on December 30, 1966, literally no action has been taken on hundreds of pending applications for entry on desert lands and many pending contests remain unresolved awaiting the final determination of this controversy. If the interpretation given the Desert Land Act by the Court of Appeals for the Ninth Circuit is allowed to stand, millions of acres of otherwise productive land will remain arid and useless despite the clear mandate of the Congress prescribing the method by which such lands are to be rendered productive. The Department of Interior will have been allowed to substitute its judgment for that of the Congress. The refusal of the court below to follow its prior decisions as well as the long-standing decisions of other circuits and of this Court literally compels a review by this Court. It is only after this Court resolves these conflicts that the vital development of this vast reservoir of unproductive land (in the national interest as perceived by the Congress) can go forward with any certainty.

2. The decision of the Court of Appeals represents a radical departure from the accepted and usual course taken in judicial proceedings in that:

(a) The decision of the Court below is a shocking departure from established principles of appellate review in that findings of the trial court are ignored notwithstanding ample evidence supporting them and despite the fact that the burden of proof rested upon the Government and, in the view of the Judge who heard the evidence, was not met;

(b) The decision of the Court below renders nugatory the provisions of the Administrative Procedure Act and deprives those who deal with the Department of Interior of the security afforded by final departmental decisions and effectively denies access to the courts for their review;

(c) The decision of the Court below sanctions capricious, oppressive, arbitrary and unlawful conduct by the Department of the Interior and sanctions clear denials of due process of law.

A. The Court of Appeals' Decision Conflicts With Longstanding Authority.

The conflict between circuits, which we take this means of bringing to the attention of the Court is apparent from that portion of the Opinion of the Court below where, in referring to *United States v. Mackintosh*, 85 Fed. 333 (8th Cir. 1898), it is stated:

> "However, *Mackintosh* was decided before the enactment of certain amendments to the Desert Land Act and without the benefit of Supreme Court precedent construing the Act. We decline to follow it." (Appendix F, p. 148).

The decision reflects a misapprehension of the legislative history of the Desert Land Act and its interrelation with other statutes providing for the acquisition of federal lands.

This misapprehension should be placed in context. First, the Government has conceded that the entrymen had the requisite intent to enter the lands, irrigate and reclaim them for their own benefit when the applications for entry were filed. The thrust of the decision of the Court below is that there was an agreement for the sale of land made after proper application for entry and before the issuance of patents and that such an agreement is conclusive proof of fraud. Later in this Petition we will show that no such agreements existed. Nonetheless, assuming their existence, they are not fatal so long as the requisite intent obtained at the time the applications were filed.

The Eighth Circuit has squarely held that there was "nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected. . . ." *United States v. Mackintosh, supra,* at page 338. Thus, in determining whether there was fraud in the submission of final proofs, the inquiry should be limited to whether the land has indeed been reclaimed by conducting water upon the entry as required by the statute. The Government, on the other hand, has contended throughout that the slightest hint of an intention to dispose of the land, whenever formed, must be disclosed.

The Desert Land Act, like the Timber Culture and Timber and Stone Acts of 1875, does not limit an entryman's right to make executory contracts for the sale of land after patent, nor require upon final proof an oath that no intention to do so exists. The Court below refers to the 1891 and 1908 amendments to the Act and attempts to torture a restraint upon alienation after patent into its provisions. The legislative history of the

1891 amendment reveals the error of this contention. Both the Homestead Act and the Desert Land Act were amended in 1891 by the same bill which provided for a restraint upon alienation under the Homestead Act but did not include such restraint in the Desert Land Act. *Act of March 31, 1891,* C.H. 561, §2, 26 Stat. 1096. There was precedent for this action by the Congress since in 1888 an effort to include a prohibition against sales in the Desert Land Act was rejected by the Congress. *H. R. Rep. No. 788,* 50th Cong., 1st Sess. (1888). Nor did the 1908 amendment to the Desert Land Act prohibit corporate financing of development or executory sale of lands before patent. The legislative history of the 1908 Act shows that Congress intended only to prohibit assignments of entries to a corporation. *S. Rep. No. 341,* 60th Cong., 1st Sess. (1908). Petitioners have never argued that an assignment to a corporation is valid but have urged that the financing arrangements made in these cases did not constitute an assignment and the District Court so held.

In *Adams v. Church,* 193 U.S. 410 (1904), involving the Timber Culture Act, this Court held that since the law did not require an affidavit before final certificate that no interest in the land had been sold, an agreement for such sale would not be fatal as long as the original entry had been made in good faith. This Court urged that, had Congress intended such result to follow, it would have so declared in the law. *Adams v. Church, supra,* at page 416.

In *United States v. Williamson,* 207 U.S. 425 (1908), involving the Timber and Stone Act, this Court struck down an administrative requirement that the applicant reaffirm that he had not arranged to, in effect, transfer any interest in his land at the time of final proof.

Here again this Court held that the approval of such an administrative requirement would have amounted to judicial legislation in the face of contrary Congressional mandate.

In *United States v. Biggs*, 211 U.S. 507 (1908), while condemning preexisting arrangements to sell made prior to original entry, this Court reaffirmed its position that absent express statutory provision to the contrary, there was no impropriety in arrangements for sale made at a later date. Please see also *United States v. Barber Lumber Co.*, 194 Fed. 24 (9th Cir. 1912), decided after the amendments to the Act, wherein the Ninth Circuit held there was no prohibition against a corporation's financing of reclamation even though coupled with an agreement to sell after patent, so long as the original entry was made in good faith. Please see also *United States v. Kettenbach*, 208 Fed. 209 (9th Cir. 1913), in which the Ninth Circuit confirmed that the controlling issue is ruled solely by the character of the primary application.

Moreover, the *Mackintosh* decision was approved and quoted at length by the Ninth Circuit in a similar case, *Connor v. United States*, 214 Fed. 522, pages 535-36 (9th Cir. 1914), in which the Ninth Circuit also noted that the Secretary of the Interior had approved and applied the *Mackintosh* holding in his own decisions (Alonzo B. Cole, 32 I.D. 420 (1907)).

If there was fraud in the acquisition of the lands in question it had, under existing law, to have occurred either at the time of application for entry through the absence of the requisite intent of the entrymen to reclaim the land for themselves or, by submitting false information or failing to disclose required and material facts in

the final proofs. As noted above, the Government has conceded that there was no fraud in the inception. Further, there was no fraud in the submission of final proofs. The Desert Land Act provides for the allowance of entries to qualified persons who enter the land intending to reclaim it by conducting water to it and upon payment of $.25 an acre. Within the time required, $3.00 per acre must be expended in the irrigation, reclamation and cultivation of the land. Upon satisfactory proof of reclamation and cultivation, and upon payment of the additional sum of $1.00 per acre, the entryman becomes entitled to a patent. There is no question but that these requirements of the law were met as disclosed by the final proofs.

Although other issues were raised in the contests, the disposition of the entire controversy now seems to rest on the holding of the Court of Appeals that there was fraud. The Court below impliedly concedes that, absent fraud, the earlier decision on the other grounds of contest should stand. To cancel the patents, the Government, of course, had to prove fraud by clear and convincing evidence. The Court of Appeals concludes that the Secretary had the power to set aside the 1964 decision, in any event, since, if the Secretary were obliged to issue the patents, he would only be bound to cancel them for the same fraud that would vitiate the patents already granted. The Court justifies the reopening by quoting from 43 C.F.R. §1843.9 (1965) which states:

> "When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed except for fraud or gross irregularity."

The Court then states:

> "We approve the implicit finding of the Secretary that there was 'fraud or gross irregularity' in the original dismissal of the contest on a stipulated record which did not reveal *material facts*, as well as in the conduct of the patentees and developers." (Emphasis added) (Appendix F, p. 152).

Applying the quoted regulation, it is apparent that the 1964 decision must be regarded as final except for fraud or gross irregularity. The only new evidence introduced at the second administrative hearing consisted of (i) Exhibit G-115 which the Court below describes as a "somewhat cryptic handwritten memo" and which was found not to constitute an agreement by the District Court; (ii) a series of offers from Hoodco to certain of the entrymen dated August 15, 1963, which were never delivered to the entrymen; and (iii) an offer from Hoodco to Reed and Michener dated August 31, 1963 which was never accepted.

Thus, in the face of clear authority which provides that, absent a requirement to that effect in the statute, the law does not prohibit an agreement of sale, the Court below found an agreement based on an unenforceable cryptic memo, and offers which were either unproffered or unaccepted. After reaching this startling conclusion, the Court below then goes one step further and holds that this constitutes "virtually conclusive" evidence of fraud.

If this decision stands, the Court below will have written into the Desert Land Act provisions which the Congress, the trial and appellate courts and this Court have consistently refused to do to date. Moreover, the Court of Appeals has allowed its incorrect perception of requisite intent to do double duty through concluding that the Government is correct in its view that the

financing arranagements entered into were somehow also improper.

Thus, the Court below has literally made impossible the development of desert lands by those who need financing to develop their entries, despite the recognition by the Department that entries may be mortgaged for that purpose. 43 C.F.R. 2521.4(d). If this is to be the law, we submit that such a radical departure from precedent ought to be pronounced by this Court.

Parenthetically, we note that although the Court below speaks exclusively of the fraud of Hoodco, entrymen who still have rights under the financing arrangements of 1963 as well as patentees continue to be parties to this proceeding not only to protect valuable property rights but also to resist the charges that legitimate financing arrangements entered into in good faith and upon the advice of counsel can be translated into a fraud by them upon the United States. Petitioners do not believe that compliance with the law as pronounced by the highest courts should, because of a change in administrative policy, be branded as fraud.

B. The Lower Court Decision Departs From the Usual Course Taken in Judicial Proceedings.

1. *The Function of the Trial Court Has Been Completely Subverted.*

For the Government to prevail in its action for fraud, the evidence must be clear, unequivocal and convincing. *United States v. Barber Lumber Co.*, 172 Fed. 948, 956

(1909). As stated by the Interior Department in *Williams v. Kirk*, 38 I.D. 429 (1910) at page 432:

> "No mere suspicion of the good faith of the entrymen should be indulged, neither should the large property right granted be destroyed or withheld from the entrymen except upon convincing evidence of fraud."

Please see also, *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325 (1887) quoted with approval by the Ninth Circuit in *Connor v. United States, supra,* at 529 wherein the Ninth Circuit concluded that there must be clear, unequivocal and convincing evidence before a patent may be cancelled for fraud. This authority notwithstanding, the Court of Appeals stated:

> "Despite the great weight to be accorded findings made by trier of fact upon disputed contentions of fact, we cannot escape the conclusion that the District Court here gave undue weight to the substantial investment of Hoodco in developing the lands." (Appendix F, p. 144).

In other words, despite the heavy burden of proof imposed on the Government and the finding of the trier of fact that it had not been met, the Court below deemphasizes facts which the District Court regarded as important. By stipulation, the District Court considered all of the proceedings at the two administrative hearings as well as direct testimony from the participants along with over four hundred exhibits. Having heard the testimony of those actively involved, and having concluded that efforts to finance the reclamation of the land were in good faith, the District Court's decision should be entitled to more than the lip service accorded it by the Court of Appeals.

2. ***Decisions of the Department of Interior Must at Some Stage Become Final and Are, in Any Event, Subject to Judicial Review.***

First, these proceedings arise out of questions relating to the interpretation of the Desert Land Act. The regulations issued pursuant to the Act provide for administrative hearings of disputes arising out of its administration. Secondly, the Congress has passed comprehensive legislation in the Administrative Procedure Act designed to safeguard the rights of persons appearing before administrative agencies and has further provided for judicial review of agency determinations (5 U.S.C. §701 *et seq.*).

Of course, the Secretary of Interior has broad powers of control and supervision. These, however, do not clothe him with any discretion to enlarge or curtail the substantive rights of the grantee nor to substitute his judgment for the will of the Congress. *Payne v. Central Pac. Ry Co.*, 255 U.S. 228 (1921). Please see also *United States v. United Verde Copper Co.*, 196 U.S. 207 (1904). In this case, we do not challenge the authority of the Secretary to determine what lands are available for entry or his authority to determine if the essential reclamation has taken place. He has those prerogatives. But in his administration of the public lands, he must comply with the standards set by the Congress. This he has failed to do.

3. *The Decision of the Court Below Sanctions Oppressive and Unlawful Conduct.*

Departmental regulations, as they read in 1965, provided that absent an appeal, the Director's decision shall be final except for fraud or gross irregularity. 43 C.F.R. 1843.9 (1964). They further provide that any

party adversely affected by a final decision of the Director may appeal to the Secretary. 43 C.F.R. 1844.1 (1965). The Government did not appeal the August 14, 1964 decision, and was thus foreclosed from challenging it. Despite this, the Government reopened the matter by filing an amended complaint and ordering a new hearing. There is no published regulation sanctioning this procedure despite the mandate of 5 U.S.C. §552 which provides:

> ". . . *No person shall in any manner be required to resort to organization or procedure not so published.*" (5 U.S.C. §552) (emphasis added).

The Department of the Interior is subject to the provisions of the Administrative Procedure Act. *Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1959); *United States v. O'Leavy,* 63 I.D. 341 (1956). Thus the government not only violated its own regulations but acted by means of unauthorized procedures.

4. *It Was Error for the Government to Ignore Its Prior Stipulation.*

The decision of August 14, 1964 was rendered pursuant to a stipulation under the terms of which a final determination of the matters in dispute was to be made based upon a stipulated record. In the course of the trial in the District Court, it was shown that the stipulated record contained all of the matters complained of by the Government except certain immaterial facts which, under the law, could have no bearing on the issues. A stipulation authoritatively made on behalf of the United States Government must be adhered to in the same manner as any other stipulation. *United States v. Fallbrook Public Utility Dist.,* 165 F.Supp. 806 (S.D. Cal. 1958). Nor is it sufficient to say that the stip-

ulation could be ignored because of fraud, when no fraud was proved.

5. *The Government Was Correctly Estopped by the District Court.*

The Court of Appeals concluded that the Government could not be estopped from urging the same grounds of contest disposed of by the decision of August 14, 1964. Contrary to the statement made in the decision of the Court below, we do not contend that the Government should be estopped in this case as an exception to the general rule that the Government is not estopped to attack illegality. We contend that the Government should be estopped since the alleged grounds of illegality had previously been disposed of in a final decision of the Department of Interior. One need look no further than the Court of Appeals for the Ninth Circuit itself for well-considered opinions holding that the doctrine of estoppel may be applied against the Government where justice and good conscience dictate. Please see *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970).

6. *The Entrymen Have Been Deprived of Property Without Due Process of Law.*

It has long been recognized that an entryman has a property right particularly where he has done everything required to enable him to obtain a patent. *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893). The execution and delivery of a patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Pallinger v. U.S. ex rel. Frost*, 216 U.S. 240 (1910). A brief review of the procedural steps followed in these proceedings

conclusively shows that valuable property rights were taken without due process of law. After concluding on September 4, 1964, that all of the entrymen were entitled to patents, nothing official was done until April 5, 1965 when the solicitor sent a memorandum to the Secretary complaining about the decision without notice to the entrymen. This action by the solicitor of the Department of Interior constituted the very type of conduct that the Congress sought to prevent by the enactment of 5 U.S.C. §554 which provides that:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, . . . participate or advise in the decision, recommended decision or agency review . . ."

Furthermore, the Hearing Officer at the second administrative hearing had before him the solicitor's memorandum to the Secretary and he could hardly have ignored the statements contained therein to the effect that even if the facts were as disclosed in the stipulated record, the Director's decision was incorrect as a matter of law. This type of unilateral conduct literally cries out for judicial sanctions.

The Court below dismisses our contention in this regard by pointing out that the communication between the solicitor and the Secretary was not unauthorized since there was no statutory or constitutional requirement that the Secretary's decision be preceded by a formal hearing. This, of course, overlooks the fact that there had been a formal hearing which had gone to final decision and the action of the solicitor amounted to nothing less than an unauthorized and untimely appeal from such decision without notice to the contestees.

Lastly, the Court below argues, in effect, that petitioners should not complain since the amounts expended in reliance on the 1964 decision are negligible compared to the value of the land. This statement is gratuitous and not supported by any evidence. Moreover, the only reason that the land has value at the present time is because of the improvements made by the petitioners in a good faith effort to finance the reclamation and irrigation of the land, upon the advice of counsel and in accordance with the long-standing law authorizing the financing of such reclamation.

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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ALAN R. WOODARD,
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Attorneys for Petitioners.

APPENDIX.

Constitutional Provisions, Federal Statutes and Regulations.

Amendment V—Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. §§552, 554, 701, 702 and 706.

5 U.S.C. § 552. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each Agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any

agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

5 U.S.C. § 554. *Adjudications*

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make

the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 384.

5 U.S.C. § 701. *Application—Definitions.*

—(a) This chapter [§§ 701-706 of this title] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [§§ 701-706 of this title]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix [see 22 §§ 2456 (a), 2457], and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given

them by section 551 of this title. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392.)

5 U.S.C. §702. *Right of review.*—A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392.)

5 U.S.C. § 706. *Scope of review*

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

28 U.S.C. §1345.

28 U.S.C. § 1345. *United States as plaintiff*

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress. June 25, 1948, c. 646, 62 Stat. 933.

43 U.S.C. §§321, 324, 327, 328 and 329.

43 U.S.C. § 321. *Entry right generally; extent of right to appropriate waters*

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of 25 cents per acre—to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of

irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment to such officer of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him. Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under sections 321-323, 325 and 327-329 of this title. However, in that entry one or more tracts may be included, and the tracts so entered need not be continguous. The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres, and all the tracts entered by one person shall be sufficiently close to each other to be managed satisfactorily as an economic unit, as determined under rules and regulations issued by the Secretary of the Interior. Mar. 3, 1877, c. 107, § 1, 19 Stat. 377; Aug. 30, 1890, c. 837, § 1, 26 Stat. 391; Oct. 28, 1921, c. 114, § 1, 42 Stat. 208; Mar. 3, 1925, c. 462, 43 Stat. 1145; 1946 Reorg.Plan No. 3, § 403, eff. July

16, 1946, 11 F.R. 7876, 60 Stat. 1100; Aug. 14, 1958, Pub.L. 85-641, § 1, 72 Stat. 596.

43 U.S.C. § 324. *Assignment of entries*

No assignment after March 28, 1908, of an entry made under sections 321-323, 325 and 327-329 of this title shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. Mar. 28, 1908, c. 112, § 2, 35 Stat. 52.

43 U.S.C. § 327. *Filing irrigation plan—Association of entryman.*—At the time of filing the declaration hereinbefore [in § 321 of this title] required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements. (Mar. 3, 1877, c. 107, § 4, as added Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

43 U.S.C. § 328. *Expenditures and cultivation required.*—No land shall be patented to any person under this act [§§ 321-323, 325, 327-329 of this title] unless he or his assignors shall have expended in the necessary

irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land. (Mar. 3, 1877, c. 107, § 5, as added Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

43 U.S.C. § 329. ***Issue of patent on final proof; citizenship requirement as to patentee; limit as to amount of holding***

At any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to such officer of the additional sum of $1 per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to March 3, 1891: *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under sections 321-323, 325 and 327-329 of this title shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States. Mar. 3, 1877, c. 107, § 7, as added Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096, and amended Oct. 28, 1921, c. 114, § 1, 42 Stat. 208; Mar. 3, 1925, c. 462, 43 Stat. 1145; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.

43 C.F.R. 1843.9, 1844.1 and 2521.4(d).

43 C.F.R. 1843.9 (1964):

"When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed except for fraud or gross irregularity."

43 C.F.R. 1844.1 (1965):

"Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision, except from such a decision which, prior to a promulgation has been approved by the Secretary. . . ."

43 C.F.R. 2521.4(d) (1970):

"A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereof and not as a conveyance thereof. The purchaser at a sale had for the foreclosure of such mortgage may be recognized as assignee upon furnishing proof of his qualifications to take a desert-land entry by assignment. Transferees, after final proof, mortgagees, or other encumbrances may file in the proper land office written notice stating the nature of their claims, and they will thereupon become entitled to receive notice of any action taken by the Bureau of Land Management with reference to the entry."

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FILED
AUG 31 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-396

WALLACE REED, *et al.*, *Petitioners,*

vs.

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*, *Respondents.*

UNITED STATES OF AMERICA, *Respondent,*

vs.

HOOD CORPORATION, *et al.*, *Petitioners.*

Appendix to Petition for Writ of Certiorari.

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Appendix to Petition for Writ of Certiorari.

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APPENDIX A.

Decision of the Bureau of Land Management Dated August 14, 1964.

INDIAN HILL
UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

In reply refer to:
722c
Idaho 012234, 012235, 012241, 012242, 012243, 012244, 012299, 012342, 012343, 012349
Certified Mail
Return Receipt Requested
August 14, 1964
Desert Land Entries

DECISION

Raymond T. Michener
Wallace Reed
Marjorie K. Michener
Joseph L. Nielsen
Robert R. Schwarze
Myrtle M. Reed
George L. Crapo
Norma E. Barnes
Charles E. Barnes
Blaine L. Garn

Contest Dismissed

This is a contest brought by the Manager of the Boise Land Office against ten desert land entries in the State of Idaho. The entries are as follows: Idaho 012234, Raymond T. Michener, SE¼, S½NE¼, Sec. 5 and

N½NE¼, Sec. 8, T. 6 S., R. 8 E., B.M., 320 acres; Idaho 012235, Wallace Reed, N½, Sec. 9, T. 6 S., R. 8 E., B.M., 320 acres, Idaho 012241, Marjorie K. Michener, SW¼, SW¼SE¼, Sec. 4, T. 6 S., R. 8 E., B.M., 200 acres; Idaho 012242, Joseph L. Nielsen, S½, Sec. 9, T. 6 S., R. 8 E., B.M., 320 acres; Idaho 012243, Robert R. Schwarze, S½S½, Sec. 10 and N½NW¼, W½NE¼, Sec. 15, T. 6 S., R. 8 E., B.M., 320 acres; Idaho 012244, Myrtle M. Reed, SW¼NE¼, S½NW¼ N½S½, Sec. 10, T. 6 S., R. 8 E., B.M., 280 acres; Idaho 012299, George L. Crapo, SW¼, S½NW¼, N½SE¼, 15, T. 6 S., R. 8 E., B.M., 320 acres; Idaho 012342, Norma E. Barnes, SE¼, E½SW¼, Sec. 7 and W½SW¼, Sec. 8, T. 6 S., R. 8 E., B.M., 320 acres; Idaho 012343, Charles E. Barnes, SE¼, E½SW¼, Sec. 8, and N½-NW¼, Sec. 17, T. 6 S., R. 8 E., B.M., 320 acres; Idaho 12349, Blaine L. Garn, NE¼, N½SE¼, SE¼-NW¼, NE¼SW¼, Sec. 17, T. 6 S., R. 8 E., B.M., 320 acres.

The entries are situated along the Snake River in T. 6 S., R. 8 E., Boise Meridian, in the vicinity of Hammett. The lands on which the entries have been made are on a bench which rises approximately 400 feet above the river. In order to irrigate the lands, it is necessary to pump water from the Snake. This has been accomplished by means of an expensive system of pumps, ditches and sprinkler pipes, installed for the entrymen by third parties pursuant to several agreements hereinafter discussed. It appears from the record that the entrymen have succeeded in reclaiming the lands and that they have met the irrigation and cultivation requirements of the Desert Land Act.[1]

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[1]Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C. § 321 *et seq.* (1958).

The entrymen filed their applications to make desert land entries during January and February, 1961. The entries were allowed on March 13, 1963, and five of the entrymen filed their final proofs on September 26, 1963.[2] The remaining five entrymen have not yet filed final proofs, but have filed first-year annual proofs.[3]

It appears that, subsequent to the making of their entries, the entrymen determined that it was necessary for them to cooperate with one another in order to successfully develop the entries. Two of the entrymen, Wallace Reed and Raymond T. Michener, became the spokesmen and representatives of the group and have continued to act in that capacity. On or about March 7, 1961, the entrymen formed a non-profit corporation, Indian Hill Irrigation Company, to obtain the irrigation facilities and water necessary to develop the entries.

Each entryman has purchased shares of stock in the company according to the size of his entry, on the basis of one share per acre. No shares have been sold to persons other than the entrymen.

On March 10, 1961, the Indian Hill Irrigation Company filed a notice of intent to apply for a small projects loan to be obtained through the Bureau of Reclamation. During the next two years, the company at-

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[2]The 5 entrymen who have filed final proofs are: Wallace Reed (Idaho 012235); Joseph L. Nielsen (Idaho 012242); Robert R. Schwarze (Idaho 012243); Myrtle M. Reed (Idaho 012244); George L. Crapo (Idaho 012299). Although the parties have stipulated that these entrymen made final proof on September 4, 1963, the case files, which are a part of the record, reflect that the final proofs were in fact filed on September 26, 1963.

[3]The 5 entrymen who have filed annual proofs, but who have not as yet submitted final proofs, are: Raymond T. Michener (Idaho 012234); Marjorie K. Michener (Idaho 012241); Norma E. Barnes (Idaho 012342); Charles E. Barnes (Idaho 012343); Blaine L. Garn (Idaho 012349).

tempted to obtain such a loan, but ultimately this attempt was unsuccessful.

In February, 1963, Messrs. Reed and Michener executed an instrument with Mr. A. J. Jolley and Ore-Ida Motors, Inc., in which they purported to lease the lands embraced in the entries to Jolley and Ore-Ida Motors, Inc. for a term of five years. The instrument provided that the lessees would share-crop the lands and it appears that an attempt was made to give the lessees an option to purchase the lands during the term of the lease. This instrument was terminated by agreement between the same parties on May 31, 1963, without attempt to exercise any purported purchase-option rights on the part of the lessees. It should be noted in this regard that, even absent termination by the parties, it is doubtful that the instrument did, in fact, constitute an enforceable agreement in view of its loose and imprecise language.

On February 18, 1963, the individual entrymen entered into separate agreements with Indian Hill Irrigation Company for the purpose of having the entries developed by the company. The company agreed to construct irrigation works sufficient to meet the requirements of the desert land laws and to farm the lands thereafter. The entrymen agreed to pay all fees due the Government and all costs incurred to bring the land to a tillable condition, while the company agreed to pay the farming costs.

On February 19, 1963, the entrymen individually entered into additional separate agreements with Indian

Hill Irrigation Company. Under these new agreements, the entrymen agree to pay their proportionate shares of all costs of pumping and delivery of water through the facilities of Indian Hill, plus monies to be placed in a depreciation reserve. It is further agreed that Indian Hill may use the depreciation funds to make annual payments to Hood Corporation[4] for the furnishing and installation of the irrigation facilities owned by Indian Hill. The entrymen further agree to pay their proportionate shares of the payments required to be paid to Hood Corporation by Indian Hill. The agreement further provides that it supersedes all prior agreements between the parties.

On the same date (February 19, 1963), each entryman executed a promissory note payable one year after the issuance of patent, for an amount equal to $100 per acre. Also on the same date,[5] the entrymen executed mortgages to secure these notes which provide that the mortgagee's right of recourse is limited solely to foreclosure of the mortgage and that the mortgagors shall not be liable for any deficiency judgments after foreclosure of the mortgages.

It appears that during the early months of 1963, Michener and Reed reached an understanding with the Hood Corporation whereby Hood agreed to undertake the

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[4]The Hood Corporation is a construction company specializing in pipeline installation. Indian Hill Irrigation Company contracted with Hood Corporation to construct a pumping plant and irrigation system.

[5]The parties have stipulated that the mortgages were given on February 19, 1963, although it appears from the record that the entrymen's signatures were acknowledged on August 30, 1963.

developing of the lands. In order to effectuate this, Hoodco Farms, Inc., was organized by Hood as a wholly-owned subsidiary. On August 15, 1963, the entrymen entered into agreements with Hoodco Farms, Inc., whereby it is agreed that Hoodco Farms will proceed:

> ". . . to develop and improve said desert land entry in such manner and with such time as may be required by the desert land laws in order that [the entryman] may meet the requirements of such laws and obtain patent to said desert land entry. . . ."

On their part, the entrymen agree to pay Hoodco Farms for such development and improvement the sum of $200.00 per acre of land developed on each entry. It is agreed that all of the irrigable land included in each entry will be developed. Each entryman agrees to execute a promissory note to Hoodco Farms for this amount and to give Hoodco Farms a second mortgage on the lands in his entry to secure the note. The agreement provided that Hoodco Farms will develop and improve the lands subject to the condition that Hoodco Farms shall have the right to farm said lands and receive the crops grown thereon until the end of the year during which the note is fully paid. It is provided that;

> "The amount owing by [the entryman] to [Hoodco Farms] under the terms and conditions of said note and mortgage shall be reduced by 5% of the principal amount of said note for each year that [Hoodco Farms] farms the above described lands and received the crops therefrom. It is understood

> and agreed that if [Hoodco Farms] continues to lease and farm said lands for twenty years, the indebtedness evidenced by said note shall be fully cancelled and said mortgage shall be satisfied of record at the end of said twenty-year period."

It is further agreed that the only recourse or right of action which Hoodco Farms shall have against the entrymen in the event of default under the terms and conditions of the notes and mortgages is to foreclose the mortgages. Hoodco Farms has no right to maintain any actions on the notes except in connection with the foreclosures of the mortgages and the entrymen shall not be liable to Hoodco Farms for any deficiency judgments on any mortgage foreclosures.

Hoodco Farms has agreed that, during the time it farms the lands, it will pay all amounts which the entrymen have agreed to pay to Indian Hill Irrigation Company. The entrymen have agreed that they will pay all taxes levied and assessed against their lands.

The agreement further provides that Hoodco Farms shall be under no obligation to continue to farm the lands after they have been "sufficiently developed as necessary to meet the government requirements for final proof and for the issuance of a patent." In the event that Hoodco Farms ceases to farm the lands prior to the time the notes are fully paid off, the entrymen must pay the entire balance of the notes within one year with interest at 7% per annum.[6]

Also on August 15, 1963, each entryman executed the agreed upon mortgage and promissory notes which

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[6]The notes do not begin to bear interest until Hoodco Farms ceases farming the lands. The balance due is computed by deducting 5% of the amount of the note for each year that Hoodco Farms has farmed the lands.

were accepted by Hoodco Farms. The following provision appears in each note:

> "Hoodco Farms, Inc., has the right to farm the lands described in the mortgage securing this note until such time as this note shall be fully paid and the principal amount of this note shall be reduced by the amount of 5% per year for each and every year Hoodco Farms, Inc. shall farm said lands."

As additional consideration for Hoodco Farms agreeing to develop their entries, the entrymen have pledged their stock in Indian Hill Irrigation Company to Hoodco and have given Hoodco the right to vote said stock by proxy.

The first charge brought against each of the contestees is as follows:

> The desert land entryman has granted to others not qualified to hold desert land entries the right to develop and farm the public land in his entry under various long-term contractual agreements, thus avoiding the assignment provisions of the Desert Land Act.

This charge is, in effect, that the arrangements between the entrymen and Hoodco Farms, Inc., are tantamount to an assignment of the entries by the entrymen to Hoodco Farms, Inc. If this be true, the arrangements in question are contrary to the statute[7] which provides that:

> No assignment after March 28, 1908, of an entry made under sections 321-323, 325 and 327-329

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[7]Act of March 28, 1908, c. 112, § 2, 35 Stat. 52, 43 U.S.C. § 324 (1958).

> of this title shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry, and such assignments may include all or part of an entry, but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

An assignment is a transfer or setting over of property, or some right or interest therein, from one person to another and, unless in some way qualified, it is properly the transfer of one's whole interest in an estate, chattel, or other thing. *Hunter-Wilson Distilling Co. v. Forest Distilling Co.*, 84 F. Supp. 996, 1000 (D.C. Pa., 1949); *Morton v. Thorton* 259 N.C. 697, 131 S.E. 2d 378, 380 (1963); and see other definitions collected at 4 Words and Phrases, "Assignment."

The statute, *supra*, prohibits assignments of entries to corporations. By definition, what is prohibited is the transfer of the entryman's entire interest in the entry.

On close analysis the agreements between the parties in the present case do not effect such a transfer. The entrymen have executed notes and mortgages on their entries. In addition, they have agreed to put the mortgages in possession and have pledged their water rights to the mortgagee. Under Idaho law mortgages are considered to be liens, rather than conveyances.[8] The Department has held that, in States where mortgages are not considered to be conveyances, the mortgagee is not an assignee of the entryman. *Thomas E. Jeremy*, 24 L.D. 418, 420 (1897). This being so, it can hardly be maintained in the present case that such notes and

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[8]I.C.A. § 45-906 (1948); *Hannah v. Vensel*, 19 Idaho 796, 116 P. 115, 116 (1911); *John Hancock Mut. Life Ins. Co. v. Girard*, 57 Idaho 198, 64 P. 2d 254, 262 (1937); 5 Tiffany, Real Property, § 1380 (3d ed. 1939).

mortgages constitute transfers of any, let alone the entire, interest of the entrymen. In fact, such mortgages are expressly sanctioned by the Departmental regulations, 43 CFR § 2226.1-3(d) (Supp. April 1, 1964), and by the United States Supreme Court. *Hafemann v. Gross*, 199 U.S. 342, 345, 347 (1905).

Under the terms of the specific agreements herein considered, the entrymen have entered into a contract with Hoodco Farms whereby Hoodco Farms may farm the lands for an indefinite period up to a possible twenty years. This farming arrangement may be terminated by either party, as follows. Each entryman may terminate by paying off his note; Hoodco Farms may terminate, at its option, at any time after it has developed the land sufficiently to enable the entrymen to meet the reclamation requirements of the Desert Land Act; and finally, the arrangement, if it should continue so long, will terminate automatically after twenty years by reason of the note then being fully paid. Such an arrangement clearly can be no more than a lease. Indeed, since Hoodco Farms' interest in the land arises from a mortgage, coupled with a development contract, its interest does not appear to attain even the status of a lease, in view of the rule that where the mortgagee is in possession, his interest is that of a lien securing the mortgage debt, and not a real property interest.[9] Certainly, the granting of an interest which is in the nature of a leasehold, or lesser interest, cannot be construed as passing the entryman's entire interest in the entry.

Finally, the entrymen have pledged their shares of stock in Indian Hill Irrigation Company to Hoodco Farms.

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[9]2 Glenn, Mortgages 1027 (1943). But see 1 Tiffany, *Landlord and Tenant* 325-326 (1912) holding that a mortgagee in possession is a lessee, although noting that the opposite has been held.

A pledge is a security transaction whereby possession of the pledged property passes to the pledgee but legal title remains in the pledgor. Accordingly, no interest in the entry passed to Hoodco Farms by virtue of the pledge of stock in the irrigation company.

From the foregoing, it must be concluded that the entrymen have not assigned their entries to Hoodco Farms, nor have they entered into agreements which circumvent the assignment provisions of the desert land laws. The mere fact that Hoodco Farms is in possession of the lands and controls them almost exclusively does not irresistably lead to the conclusion that there has been a *de facto* assignment.

The second charge brought against each of the contestees is as follows:

> The desert land entryman, in order to have the lands of his entry developed by others, prior to patent, has entered into a legal obligation that permits the sale of his entry after patent has been issued.

This charge is concerned with the instrument, since terminated, entered into in February, 1963, between Messrs. Reed and Michener, as lessors, and Ore-Ida Motors, Inc., and Mr. Jolley, as lessees. The charge is, in effect that an option to purchase was granted to the lessees by said instrument which constituted an executory contract to convey the lands after patent to Jolley and Ore-Ida Motors, Inc.

The regulations of the Department governing desert land entries provide in part that:

> ". . . The provisions of law authorizing the assignment of desert entries, in whole or in part, furnish no authority to a claimant under said law to make

> an executory contract to convey the land after the issuance of patent and thereafter to proceed with the submission of final proof in furtherance of such contract. (34 L.D. 383) . . .[10]

This rule is enunciated in *Herbert C. Oakley,* 34 L.D. 383 (1906), which is the case cited in the regulation. It was therein stated that the clear intent of the desert land law forbids recognition of contracts to convey after patent, irrespective of the time the contract was made and regardless of whether or not the original entry was made honestly and in good faith. The rule being clear, it remains to be seen whether the instrument in question, if enforceable, was an executory contract.

An examination of the instrument reveals that there is nothing therein constituting a present contract to convey the lands subsequent to patent. The instrument, insofar as its option provisions are involved (if, indeed, an effective option was granted by the instrument at all), was merely a continuing offer on the part of the lessors to convey or assign the lands to the lessees. It would become a contract only upon acceptance of the offer by the lessees; until then no contract obtained. The record is devoid of any evidence that the lessees ever accepted the offer. On the contrary, the record reflects that they did not. It would therefore appear that this instrument was not an executory contract to convey after patent.

A similar result was reached in *Glen W. Jensen; Margie R. Jensen;* A-29867 (February 17, 1964), wherein an agreement was considered which provided that the developers of desert land entry should have the first

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[10] 43 CFR, § 2226.1-2(c)(2) (Supp., April 1, 1964).

option to purchase or lease the land. It was held in that case that this agreement did not constitute a commitment by the appellants to convey the land and therefore was not an executory contract to convey the lands after patent.

The third charge which has been brought against each of the contestees is that:

> The desert land entryman has associated himself with other desert land entrymen to allow an association of persons to hold more than 320 acres of desert land prior to the issuance of patent.

It is provided in part by section 7 of the Desert Land Act[11] that:

> ". . . no person or association of persons shall hold by assignment or otherwise prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert lands . . ."

The question presented here is whether Hoodco Farms, Inc., by virtue of the agreement between it and the entrymen, "holds by assignment or otherwise" more than 320 acres of desert lands prior to patent. In this connection, it should be noted that prior to the enactment of the above-quoted provision, Congress had already enacted a statute providing that no person entering upon the public lands with a view to occupation, entry, or settlement, under any of the land laws should be permitted to acquire title to more than 320 acres of land.[12] These two acts must be read in *pari materia.*

In order to ascertain what is intended by these statutes, it is necessary to realize that neither of them operates

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[11]Section 7 was added to the 1877 act (19 Stat. 377) by section 2 of the Act of March 3, 1891, 26 Stat. 1095, as amended, 43 U.S.C. § 329 (1958).

[12]Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 212 (1958).

upon desert land entries subsequent to the patenting of such entries. Both of them relate to *entries.* The earlier statute enunciates the general principle that no person shall be permitted to acquire title to more than 320 acres, and the later statute applies that principle specifically to desert land entries. The 1891 act further enunciates the concept that, prior to patent, no person or association of persons, shall by assignment or otherwise hold more than 320 acres. In other words, no person who, by assignment or other arrangement tantamount to an assignment, has become in effect an entryman may hold more than 320 acres of desert land. The limitation is aimed at persons seeking to acquire title from the United States, i.e., entrymen and their assignees. Thus, this provision of the law is applicable only where the holdings of any entryman or any entryman's assignee are being scrutinized.[13] It does not apply to persons whose interest in the land is less than the entire interest of an entryman.

In the foregoing discussion of the first charge, it was shown that Hoodco Farms' interest does not derive from an assignment. Since Hoodco Farms is not in the position of an entryman, the acreage limitation does not apply to it and the third charge cannot be sustained.

The fourth and final charge brought against each of the contestees is that:

> The desert land entryman has not made a bona fide entry with the intent to reclaim the lands of his entry and he has allowed himself to be used by others who actually control the development and operation of the entry.

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[13]*Stuart v. Burke,* 32 L.D. 646 (1904).

This charge is an attack on the good faith of the entrymen. In support of the charge, the following allegations have been made by the contestant.

(a) The entrymen have developed their entries in a manner different from that set forth in their original declarations.

(b) The entrymen have not developed their entries with their own capital and labor.

(c) The entrymen have never occupied their entries.

(d) Hoodco Farms has complete control of the entries.

From these allegations the contestant concludes that the entrymen are merely dummies who are holding their entries for speculation.

With regard to the first allegation, there is no requirement by statute or regulation that the entryman may not deviate from his original plan of development. Such a requirement would be unrealistic and unnecessary. If at the time of final proof the entryman can demonstrate that he has constructed a satisfactory irrigation system and has reclaimed the land, then the fact that he has not followed his initial plan is unimportant. The second allegation misconstrues the requirements of the law. The regulations expressly recognize the right of the entryman to seek outside capital in that he may mortgage his interest in the entered lands.[14] And, with respect to labor, the entryman is not required to perform personally the labor of reclaiming the lands but may employ others to do such work. *Saunders v. Dutcher*, 168 Cal. 353, 143 P. 599 (1914).

[14] 43 CFR § 2226.1-3(d) (Supp. April 1, 1964).

The short answer to the third allegation is that there is nothing in the desert land laws or the regulations thereunder requiring occupancy on the part of the entryman.

With regard to the final allegation, the present control of the entries by Hoodco Farms, is exercised pursuant to a mortgage coupled with a development contract.

If, as has been held above, these legal arrangements are unobjectionable, the control exercised pursuant thereto must likewise be unobjectionable. In this regard, it should be noted that the desert land laws, unlike the reclamation homestead laws, do not require that the development of the entries be performed only by the entryman personally, or by members of his family, or by persons employed under his direction, supervision, and management.[15]

In view of the foregoing, and after fully considering the entire record in this case, it cannot be concluded that the entrymen are not bona fide entrymen within the contemplation of the desert land laws and therefore the fourth charge has not been proved.

Accordingly, pursuant to the above findings, the contest is hereby dismissed.

In the adjudication of this contest, the Bureau has been presented with an extremely complicated factual situation revolving about a number of highly complex financial arrangements. It has been necessary to construe the legal effect of these particular arrangements in the light of a complicated factual background. Many elements, including the good faith of the contestees, have had to be considered. It is incumbent on the

[15]See 43 CFR § 2211.7-6(9) (Supp. April 1, 1964).

Bureau to point out, therefore, that the conclusions reached herein are limited to the precise facts of these cases.

The cases are remanded to the Boise Land Office for appropriate administrative action.

The parties listed in Appendix A are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Circular relating to the filing of appeals. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

/s/ CHARLES H. STODDARD
Director

APPENDIX B.

Decisions of the Department of the Interior as Reported in 73 I.D. 386.

UNITED STATES OF AMERICA v. OLLIE MAE SHEARMAN ET AL.—IDAHO DESERT LAND ENTRIES—INDIAN HILL GROUP

A-30759

Decided December 30, 1966

Desert Land Entry: Assignment—Act of March 28, 1908

An agreement between a desert land entryman and a corporation which gives that corporation the exclusive right to possess the entry and to grow and harvest crops thereon for a term of twenty years, is an assignment to or for the benefit of a corporation within the meaning of the prohibition in section 2 of the act of March 22, 1908.

Desert Land Entry: Assignment—Act of March 28, 1908—Words and Phrases

The term "assignment" as used in the act of March 28, 1908, applies to a transfer to a corporation of the rights of a desert land entryman to enter upon the lands and remain in effective control thereof and to grow and harvest crops thereon for the benefit of the corporation.

Desert Land Entry: Assignment—Act of March 3, 1891

To determine whether an unlawful assignment of the desert entry was made one must look to the results of the documents used to determine the real nature of the agreement rather than to the labels the parties select for their designation.

Desert Land Entry: Assignment—Desert Land Entry: Generally

Section 7 of the act of March 3, 1891, and section 2 of the act of March 28, 1908, read together, and in the light of other provisions of the Desert Land Law indicated, a Congressional intention to prevent a consolidation of entries and to exclude corporations from control and reclamation of the entries. Consequently, the words "assignment" and "holding" are to be given a construction that will make the apparent purpose of the Act effective.

Desert Land Entry: Generally—Desert Land Entry: Assignment—Act of March 3, 1891

Section 7 of the act of March 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands.

Desert Land Entry: Generally—Desert Land Entry: Assignment—Act of March 3, 1891—Words and Phrases

The terms "assignment," "hold" and "otherwise" as used in section 7 of the act of March 3, 1891, are words of broad signification and their precise meanings depend on the context in which they are used.

Desert Land Entry: Generally—Act of March 3, 1891—Words and Phrases

A corporation which has acquired actual possession or the right of actual possession to more than 320 acres of desert land "holds" such acreage within the meaning of the prohibition of section 7 of the act of March 3, 1891.

Desert Land Entry: Cultivation and Reclamation—Act of March 3, 1891

In order to comply with the requirements of section 2 of the act of March 3, 1891, a desert land entryman must either expend his own money on the necessary irrigation, reclamation, and cultivation of the entry or incur a personal liability for any money so expended.

Desert Land Entry: Applicant—Desert Land Entry: Applications—Desert Land Entry: Cultivation and Reclamation—Act of March 3, 1877

Section 1 of the act of March 3, 1877, requires a desert land applicant to file a declaration under oath that he intends to reclaim the tract of desert land for which he is making application for entry and this intent to reclaim is of the very essence of the condition upon which the entry is permitted.

Desert Land Entry: Cancellation

A patent issued to an entryman who made an entry not in good faith but with intent to evade the provisions of the law was erroneously issued and obtained by fraudulent and improper means, and must be canceled.

Rules of Practice: Supervisory Authority of Secretary—Desert Land Entry: Generally—Desert Land Entry: Final Proof—Patents of Public Lands: Effect

Until patent issues, the Secretary of the Interior retains jurisdiction to inquire, *sua sponte,* into the validity of an entry, completed except for issuance of the patent, and to set it aside for defects or mistakes existing on the date the entryman met the final requirements.

DECISION

This case involves desert land entries of the Indian Hill group on lands located in Owyhee County, Idaho, near the Snake River.

On April 9, 1965, the Decision of the Director of the Bureau of Land Management dated August 14, 1964, entitled *Raymond T. Michener, et al.*, Idaho 012234, *et al.*, was set aside.[1] Contests were directed to be instituted against Ollie Mae Shearman, I-013911, and the Estate of Charles R. Shearman, I-013912. It was ordered that entryman Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn be given an opportunity to show cause why their final proofs should not be rejected and their entries canceled. The Bureau was directed to conduct hearings in these cases and also to take evidence on the advisability of instituting actions against Wallace Reed, Joseph L. Nielson, Robert R. Schwarze, Myrtle M. Reed and George L. Crapo for cancellation of patents theretofore issued to them. The hearing examiner was instructed to submit a recommended decision after giving all parties an opportunity to be heard.

[1]Order published 72 I.D. 182.

On June 17, 1965, leave was granted to Hoodco Farms, Inc., to intervene.

Accordingly, hearings were held in Boise and Idaho Falls, Idaho, in September and October 1965. All of the entrymen and the intervenor were represented by counsel and had a full opportunity to be heard, over two thousand pages of testimony and argument were recorded, hundreds of documentary exhibits were considered and the case was thoroughly briefed by coun-

sel. Chief Hearing Examiner Dent D. Dalby rendered his Recommended Decision on May 25, 1966. Mr. Dalby's Recommended Decision will be published in the Decisions of the United States Department of the Interior as an appendix to this Decision.

The Hearing Examiner concludes,

Title 43 U.S.C sec. 329 provides that "claims or entries * * * shall be subject to contest * * * for * * * failure to comply with the requirements of law and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States." Since, in this case, there has been a failure to comply with the requirements of law, the entries must be canceled.

Exceptions to the Examiner's findings and proposed findings have been filed by the contestees, intervenor and patentees.

Upon consideration of the entire record in this case, including the "Recommended Decision" of the Chief Hearing Examiner, Dent D. Dalby, the exceptions thereto, the proposed findings and conclusions of contestees, patentees and intervenor, and the motion to dismiss of certain contestees and intervenor, I hereby make the following findings of fact:

1. That the findings of fact of Chief Hearing Examiner, Dent D. Dalby, are supported by substantial evidence and are approved and accepted;

2. That at the time their entries were allowed and for a long time prior thereto, none of the contestees and patentees herein, intended to reclaim the lands of their respective entries for their own benefit, or at all;

3. That after their entries were allowed, none of the contestees and patentees herein maintained their entries in good faith for their own benefit, or at all;

4. That prior to the dates their entries were allowed, all of the contestees and patentees herein assigned their entries to Hoodco Farms, Inc., and Idaho corporation; that all of said assignments are in full force and effect and have never been revoked or rescinded;

5. That prior to the issue of patents to the patentees, the intervenor, Hoodco Farms, Inc., held by assignment and lease all of the lands of the entries of all of the contestees and patentees herein, a total area of more than three hundred and twenty acres, to wit, a total area of three thousand six hundred and eighty-eight and six-tenths acres;

6. That each of the contestees and patentees herein failed to expend three dollars per acre, or any other sum, for the irrigation, reclamation, and cultivation of his entry;

7. That each of the entrymen, including each of the contestees and patentees, obtained his entry and each of the patentees obtained his patent, by fraud, deceit, concealment of truth and misrepresentation, for the purpose of acquiring said entries and patents and of the lands embraced therein, from the United States of America;

8. That said fraud, deceit, concealment of truth and misrepresentation was, at all times material herein, well known to and consciously undertaken by some of the entrymen, and by the intervenor and was well known to and consciously undertaken by agents author-

ized to act for and on behalf of, and acting for and on behalf of, all entrymen;

9. That early in 1965, and after the issuance of patents to the patentees herein, each of the patentees executed an option agreement and deed of his entry to Virginia Agricultural Products Company, a California corporation, and deposited the same in escrow;

10. That said Virginia Agricultural Products Company, at all times material herein, well knew of the facts hereinbefore found and well knew that said patents had been acquired from the United States of America, by fraud, deceit, concealment of truth and misrepresentation as aforesaid.

From these findings I make the following conclusions of law:

I

That the entrymen did not intend in good faith to reclaim the lands of their respective entries for their own benefit as required by law;

II

That the entrymen did not maintain their entries in good faith for their own benefit as required by law;

III

That the entrymen assigned their entries to a corporation in violation of law;

IV

That intervenor held and now holds unpatented desert lands in excess of three hundred and twenty acres, in violation of law;

V

That none of the entrymen expended three dollars per acre for irrigation, reclamation, and cultivation of his entry, as required by law;

VI

That each entryman obtained his entry and each patentee obtained his patent by material fraud on the United States of America;

VII

That intervenor participated in and benefited from said fraud;

VIII

That said Virginia Agricultural Products Company was not at any time material herein and is not now a bona fide purchaser of any interest in the lands of said entries;

IX

That all of said entries must be canceled and all moneys paid therefor must be forfeited to the United States;

X

That the motion to dismiss must be denied.

Now, therefore, it is ordered.

1. That the Recommended Decision of Chief Hearing Examiner Dent D. Dalby is adopted and approved;

2. That the motion to dismiss is denied; the exceptions are overruled; the proposed findings and conclusions are rejected;

3. That the final proofs of Raymond T. Michener, I-012234, Marjorie K. Michener, I-012241, Norma E. Barnes, I-012342, Charles E. Barnes, I-012343, Elaine L. Garn, I-012349, Ollie Mae Shearman, I-013911, and Estate of Charles R. Shearman, I-013912, be rejected and that their entries be, and they hereby are, canceled;

4. That the Director of the Bureau of Land Management cause the said entries to be canceled on the books and records of the Bureau;

5. That the Solicitor transmit the records and files in this case to the Attorney General with a request that appropriate actions be instituted (a) to cancel the patents heretofore issued to Wallace Reed (Patent No. 1236706 issued September 3, 1964), Joseph L. Nielsen (Patent No. 1236707 issued September 3, 1964), Robert R. Schwarze (Patent No. 1236708 issued September 3, 1964), Myrtle M. Reed (Patent No. 1236709 issued September 3, 1964) and George L. Crapo (Patent No. 1236710 issued September 3, 1964); and (b) to take such other action as may be necessary to protect the interests of the United States;

6. That the Solicitor and the Director of the Bureau of Land Management take steps to recover possession of the lands embraced within the entries contested in this proceeding.

Stewart L. Udall,
Secretary of the Interior.
May 25, 1966

RECOMMENDED DECISION

Statement of the Case

This proceeding was initiated (1) by the filing of complaints by the Idaho Land Office Manager of the Bureau of Land Management dated April 22, 1965, against Ollie Mae Shearman and the Estate of Charles R. Shearman; (2) by the issuance of an order dated June 17, 1965, by the Associate Director amending complaints dated July 2, 1964, against Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn; and (3) by a Notice of Hearing issued by the Associate Director dated June 17, 1965, addressed to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo. Hoodco Farms, Inc., was recognized as an intervenor.

The Government was represented by Mr. William Burpee, Boise, Idaho; Mr. Gary Weatherford, Washington, D.C.; and Mr. George Miron, Washington, D.C., all of the Office of the Solicitor, United States Department of the Interior. Contestees Raymond T. Michener and Marjorie K. Michener and patentees Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze and Myrtle M. Reed were represented by Mr. Dennis M. Olsen and Mr. George C. Petersen, Petersen, Moss and Olsen, Idaho Falls, Idaho. Contestees Norma E. Barnes, Charles E. Barnes, Blaine L. Garn, and patentee George L. Crapo were represented by Mr. C. Timothy Hopkins, Holden, Holden and Kidwell, Idaho Falls, Idaho. Contestees Ollie Mae Shearman and the Estate of Charles R. Shearman were represented by Mr. A. C. Kiser, Boise, Idaho. Intervenor Hoodco Farms, Inc., was represented by Mr. William P. Gray,

Gray, Pfaelzer and Robertson, Los Angeles, California. For convenience, the contestees and patentees will hereinafter be referred to as contestees unless otherwise indicated.

A hearing on the complaints, the Order to Show Cause, and the Notice was held at Boise, Idaho, on September 7, 8, 9 and 10, October 4, 5, 6, 7 and 8, and at Idaho Falls, Idaho, on October 11, 12, 13, 14, 15, 19 and 20, 1965. Post-hearing briefs were filed by the Government on December 5, 1965, and February 10, 1966; by contestees Raymond T. Michener, Marjorie K. Michener, Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, Ollie Mae Shearman, the Estate of Charles R. Shearman and Hoodco Farms, Inc., on January 14, 1966; and by contestees Charles E. Barnes, Norma E. Barnes, Blaine L. Garn, and George L. Crapo on January 20, 1966.

The findings of fact and conclusions of law which follow are based upon the record in the case.

Findings and Conclusions

I. Precedent Proceedings

The Acting Manager of the Idaho Land Office of the Bureau of Land Management issued complaints against Ollie Mae Shearman, Charles R. Shearman, Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, Blaine L. Garn, Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed and George L. Crapo in July 1964, pursuant to 43 CFR 1852, charging each with having granted to others long-term contractual agreements involving his desert land entry to avoid the assignment provisions of the Desert Land Act; entering into legal obliga-

tions that permit the sale of his entry after patent; entering into arrangements to allow an association of persons to hold more than 320 acres of desert land prior to the issuance of patent; and failing to make a bona fide entry with intent to reclaim desert land. The complaints were served upon all of the contestees except Ollie Mae Shearman and Charles R. Shearman.

On July 11, 1964, the Government, represented by the Acting State Director of the Bureau of Land Management and the Field Solicitor, and the contestees who had been served entered into a stipulation. This stipulation provided for "an immediate hearing of the case by the Secretary without further notice and upon the record as set forth" therein. The stipulation further provided that all parties thereto were agreed "that the matters in dispute as set forth in complaint and answer filed therein with respect to the desert land entries in question may be determined upon the record and the evidence set forth" therein.

On August 14, 1964, the Director of the Bureau of Land Management issued a decision upon the merits resolving all of the issues raised by the complaints and answers favorable to the ten contestees involved, dismissed the complaints, and remanded the cases to the Boils Land Office "for appropriate administrative action." The Land Office Manager thereupon issued patents to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo on September 3, 1964.

At the request of the Secretary of the Interior, the stipulated record was reviewed by the Solicitor. The Solicitor issued an opinion dated April 5, 1965, holding that "in this case it was unsound policy to evaluate

the proofs and dismiss the Contest on the basis of the stipulated record," and that "if, however, the facts disclosed in the record are true, the Director's Decision was incorrect on the law." He transmitted this opinion to the Secretary of the Interior with a memorandum dated April 6, 1965, recommending that the Director's decision be set aside, that proceedings be instituted against those contestees who had not been issued patents, and that the cases in which patents had been issued be transmitted to the Department of Justice for initiation of actions to cancel the patents. The Secretary of the Interior issued a memorandum dated April 9, 1965, directing that the decision of the Director of the Bureau of Land Management be set aside and that further proceedings be instituted against the unpatented entries.

The Land Office Manager issued complaints dated April 22, 1965, against Ollie Mae Shearman and the Estate of Charles R. Shearman. The Associate Director, on June 17, 1965, issued an order amending the July 2, 1964, complaints against Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn. These actions are directed to a cancellation of the contestees' desert land entries. Also on June 17, 1965, a Notice of Hearing was issued to the patentees directing them to appear at a hearing to present evidence concerning the matters covered by the charges for a determination as to whether their patents were erroneously issued or obtained by fraudulent or improper means. This determination is to be the basis for a decision as to whether court action will be initiated to annul the patents. All of these actions were consolidated.

II. The Issues

The complaints, as amended, charged the contestees with entering into agreements, notes and mortgages with Hoodco Farms, Inc., with respect to their desert land entries that constitute prohibited assignments to or for the benefit of a corporation, failing to expend the amount of money required by law necessary for the irrigation, reclamation and cultivation of the land, and making and maintaining entry with no intention to reclaim the land in good faith. The complaints also charged that Hoodco Farms, Inc., held entries in excess of 320 acres. The complaints requested that the desert land entries be canceled.

Title 43 sec. 321 of the United States Code pertaining to desert land entries provides:

> It shall be lawful for any citizen * * * upon payment of 25 cents per acre—to file a declaration * * * with * * * the Secretary of the Interior * * * that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: * * * Said declaration shall describe particularly said one-half section of the land * * *. At any time within the period of three years after filing said declaration, upon making satisfactory proof to * * * the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment * * * of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent * * * shall be issued to him * * * no person may make

more than one entry * * *. The aggregate acreage of desert land which may be entered by any one person * * * shall not exceed three hundred and twenty acres * * * (Mar. 3, 1877, c. 107, § 1, 19 Stat. 377; Mar. 3, 1891, c. 561 §2, 26 Stat. 1096.)

* * *

Section 324:

No assignment * * * shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry * * * and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. (Mar. 28, 1908, c. 112, § 2, 35 Stat. 52.)

* * *

Section 327:

At the time of filing the declaration * * * the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements. (Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

Section 328:

No land shall be patented to any person * * * unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least $3 per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry * * * the party so entering shall expend not less than $1 per acre for the purposes aforesaid; and he shall in like manner expend the sum of $1 per acre during the second and also during the third year thereafter, until the full sum of $3 per acre is so expended. Said party shall file during each year with * * * the Secretary of the Interior proof, by the affidavits of two or more credible witnesses that the full sum of $1 per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party * * * shall fail during any year to file the testimony aforesaid the lands shall revert to the United States and the 25 cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of $3 per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land. (Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

Section 329:

> At any time after filing the declaration * * * upon making satisfactory proof to the * * * Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for * * * and upon payment * * * of the additional sum of $1 per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands * * * *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries * * * shall be subject to contest * * * for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and the moneys paid therefor, shall be forfeited to the United States. (Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

The issues raised by the complaints and contestees' answers as set forth in the prehearing order and modified at the outset of the hearing (Tr. 6-8) are:

1. Whether each entry was made and is maintained with no intent on the part of the entryman to reclaim the lands and is not maintained in good faith as required by section 1 of the act of March 3, 1877 (19 Stat. 377, 43 U.S.C. sec. 321).

2. Whether patents issued to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo were erroneously issued or obtained by fraudulent or improper means.

3. Whether the agreements, notes and mortgages between the entryman and Hoodco Farms, Inc., constitute prohibited assignments to or for the benefit of a corporation in violation of section 2 of the act of March 28, 1908 (35 Stat. 52, 43 U.S.C. sec 324).

4. Whether Hoodco Farms, Inc., hold in excess of 320 acres in violation of section 7 of the act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. sec. 329).

5. Whether each entryman has failed to expend that amount required by law necessary for the irrigation, reclamation, and cultivation of the lands as required by section 5 of the act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. sec. 328).

6. Whether the entrymen are, as a matter of law, entitled to receive patents to their entries.

7. Whether the Government is bound by the stipulation and record in the proceedings upon which the order of August 14, 1964, was based and is restricted to that record.

8. Whether the charges, if proved, are grounds for cancellation of the entries.

III. The Original Financing Plan

In 1960, Raymond T. Michener, an agricultural engineer, and Wallace Reed, manager of a farm equipment store, because interested in developing desert land entries in an area in Owyhee County, Idaho, known as Indian Hill. The area consists of a flat plateau approximately 400 feet above the Snake River. In November of 1960, they visited Indian Hill and stated a preliminary appraisal of the productive capacity of the soil (Tr. 1220). The amount of investment necessary to raise the water from the Snake River to the desert lands on Indian Hill necessitated the development of

several desert land entries to make the project economically feasible. Reed and Michener, therefore, began interesting other people in the vicinity of Idaho Falls, where they lived, in filing desert land entries on Indian Hill. They prepared a brochure (G-372)[1] briefly describing the proposed project. The document stated that the "proposal consists of a plan to irrigate some 4,800 acres in the Northeast corner of Owyhee County, Idaho." The brochure included two maps of the Indian Hill area, one of which outlined a proposed irrigation system. The land with sprinkler system installed was estimated to cost $236 per acre with power charges estimated to run from $11.52 to $15.36 per acre per season. Under "Financing" the brochure stated that "arrangements can be made to purchase the land and equipment for 25 percent down." A large map of the proposed project was displayed in Reed's hardware store and the brochure was shown to interested persons.

Early in 1961, Reed and Michener succeeded in interesting Marjorie K. Michener (Raymond T. Michener's wife), Charles E. Barnes, Norman E. Barnes (Charles E. Barnes' sister), Blaine L. Garn, Myrtle M. Reed (Wallace Reed's mother), Joseph L. Nielsen, Robert R. Schwarze, George L. Crapo, Charles H. Sargent and Warren J. Bendixsen in filing desert land entry applications. Reed and Michener assisted the applicants in the preparation of their applications, supplying all of the technical information required. The following desert land applications were then filed with the land office:

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[1]Both the Government's and the contestees' exhibits are numbered numerically. The Government's exhibits are identified with the letter "G", and the Contestees' with the letter "C."

Entry No.	Date of filing	Name	Description	Acreage
I-012234	1-20-61	Raymond T. Michener	SE¼, S½NE¼, Sec. 5, N½NE¼ Sec. 8, T. 6 S., R. 8 E., B.M.	320
I-012235	1-20-61	Wallace Reed	N½ Sec. 9, T. 6 S., R. 8 E., B.M.	320
I-012241	1-23-61	Marjorie K. Michener	SW¼, SW¼SE¼, Sec. 4, T. 6 S., R. 8 E., B.M.	200
I-012242	1-23-61	Joseph L. Nielsen	S½ Sec. 9, T. 6 S., R. 8 E., B.M.	320
I-012243	1-23-61	Robert R. Schwarze	S½S½ Sec. 10, N½NW¼, W½NE¼ Sec. 15, T. 6 S., R. 8 E., B.M.	320
I-012244	1-23-61	Myrtle M. Reed	SW¼NE¼, S½NW¼, N½S½ Sec. 10, T. 6 S., R. 8 E., B.M.	280
I-012299	2- 2-61	George L. Crapo	SW¼, S½NW¼ & N½SE¼ Sec. 15, T. 6 S., R. 8 E., B.M.	320
I-012342	2- 6-61	Norma E. Barnes	SE¼, E½SW¼ Sec. 7, W½SW¼ Sec. 8, T. 6 S., R. 8 E., B.M.	320
I-012343	2- 6-61	Charles E. Barnes	SE¼, E½SW¼ Sec. 8, N½NW¼ Sec. 17, T. 6 S., R. 8 E., B.M.	320
I-012349	2- 8-61	Blaine L. Garn	NE¼, N½SE¼, SE¼NW¼ & NE¼SW¼ Sec. 17, T. 6 S., R. 8 E., B.M.	320
I-013911	1-26-61	Warren J. Bendixsen	W½ Sec. 5, T. 6 S., R. 8 E., B.M.	328.6
I-013912	2- 3-61	Charles H. Sargent	S½NE¼ Sec. 7, NW¼, S½NE¼ Sec. 8, T. 6 S., R. 8 E., B.M.	320
Total				3688.6

Each of the applicants paid the required declaration fee of 25 cents per acre, plus the $15 filing fee, for a total of $95. The applicants filed irrigation maps indicating their proposals for reclaiming the desert land. Each of these maps showed a buried penstock running lengthwise through the center of their entries with 4-inch laterals equipped with sprinklerheads running at right angles to the penstock in sufficient number to water the cultivatable portions of their entries. This irrigation proposal corresponded with the plan presented in the Reed and Michener brochure.

At about this time, Raymond T. Michener and Marjorie K. Michener applied for purchase from the State of Idaho of the east half of section 16, Township 6 South, Range 8 East, located in the south-central portion of the Indian Hill project, and Wallace Reed and Leona Reed applied for purchase of the west half. The State issued land sale certificates to the applicants on July 14, 1961 (G-228-5 and G-228-6). The total price for each half section was $7,200-$720 down and the balance in annual installments over a 40-year period.

In March 1961, Reed and Michener filed Articles of Incorporation for the Indian Hill Irrigation Company (G-98). A Certificate of Incorporation was issued by the State of Idaho on March 7, 1961 (G-97). The Articles of Incorporation specified that Indian Hill was a nonprofit corporation organized "to acquire, hold, own, maintain and control waters" to be distributed "at cost to its stockholders owning land in the area susceptible of irrigation." The corporation would "deliver water to no one who has not purchased one share of stock of the corporation for each acre * * * of irrigable land owned by him within the area served by the

corporation's distribution system." Other purposes specified were "to construct, own, operate and control" an irrigation system and "to acquire, own, operate and manager irrigable land" and "to sell such land to bona fide settlers and operators of lands in such area." The Articles provided for a board of directors, but did not provide for corporate officers.

The Articles of Incorporation also provided for a capital stock of 10,000 shares with a par value of $1 per share. The Articles listed Wallace Reed, Raymond T. Michener, Marjorie K. Michener, Myrtle M. Reed and Robert R. Schwarze as incorporators. Each incorporator was listed as a subscriber of 160 shares. The organization of the corporation was not completed until two years later. Until then, by-laws were not adopted, stock subscriptions were not obtained nor stock certificates issued.

The company did not hold regular or formal meetings of its stockholders or board of directors, or maintained a set of minutes, although, informal meetings of some of the entrymen were held at irregular intervals and memorandum notations were made of matters decided or discussed. There was apparently no election of directors or officers of the corporation. Nevertheless, Reed and Michener assumed control of Indian Hill—Reed as president and Mitchener as secretary. Payments in the amount of $240 each were made to the company by Bendixsen, Schwarze, Crapo and Nielsen, and $160 each by Blaine L. Garn and Norma Barnes, and $80 by Charles Barnes, which were designated as assessments. In August of 1962, they were recorded on the books of Indian Hill as "Stockholders Advances" and tabulated under the heading "Summary of Equity" (G-69). There is no indication that the

assessments were regarded either by the entrymen or by the Indian Hill Company as payments for stock.

In March of 1961, Reed and Michener began efforts to obtain financing for irrigating the entries from the United States Bureau of Reclamation under the Small Reclamation Projects Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. sec. 422a *et seq.*) On March 10, Reed submitted to the Bureau of Reclamation a notice of intent to apply for a loan (C-13). He stated that the notice "was authorized by resolution of the board of directors of the Indian Hill Irrigation Company on March 3, 1961," although Indian Hill was not incorporated until March 7 (G-97). During 1961 and 1962, Reed and Michener filed at least three detailed reports to the Bureau of Reclamation in an effort to obtain the loan (C-14, C-15 and C-16). The last of these (C-16) estimated the total cost of the reclamation project at $1,921,478. The contribution of Indian Hill was to be $95,828. The difference between these amounts represented the hoped-for loan. The financial statement of the Indian Hill Company listed as an asset "Mortgages on 4.320 acres Subscribed, $97,200." The evidence does not disclose that any mortgages were in existence or subscribed as of November 1, 1961, the date of the financial statement.

IV. The Proposal for Farming the Entries

By the fall of 1962, Reed and Michener became convinced that a loan to finance the project could not be obtained from the Bureau of Reclamation. They, therefore, began looking for other sources of financing and in late 1962 contacted the Travelers Insurance Company. In a letter dated January 16, 1963 (C-24), Travelers indicated that it would be willing to make a

20-year loan of $125,000 at 6½ percent interest, but required 1,000 acres under irrigation as security. Travelers required a first mortgage on the section 16 land and the completion of the requirements for title on two desert entry filings. The company additionally required "that the property be under lease to a competent and well-financed tenant who is doing an acceptable job of farming." Reed would also be required to pledge his home farm as additional security.

In the fall of 1962, Reed and Michener approached the Mode Realty in Nampa, Idaho, to obtain a tenant. Mode obtained A. J. Jolley as a prospective tenant in response to a newspaper advertisement. According to Jolley, he met Reed and Michener and entered into an oral agreement for a five-year lease with an option to purchase in January 1963 (Tr. 374). However, Reed and Michener concluded that Jolley did not have sufficient financial resources to operate a project of the size contemplated (Tr. 375). Jolley then obtained as a partner, Gib Masterson. Masterson, an experienced and successful livestock feeder, was president and owner of Ore-Ida Motors, Inc. A partnership agreement between Jolley and Ore-Ida Motors, Inc., was signed by Jolley and Masterson on February 6, 1963 (G-351). Ore-Ida Motors, was to provide $10,000 operating capital, acquire one-half interest in Jolley's agricultural machinery, and receive a note from Jolley for $6,500. Jolley was to draw $500 per month salary for his full time efforts on the Indian Hill project. The proceeds of the partnership were to be equally divided. Prior to the signing of the Jolley-Ore-Ida partnership agreement, Reed and Michener entered into negotiations with Jolley and Masterson at Masterson's office in Ontario. Oregon, to lease the Indian Hill property. They

arrived at an agreement which Masterson's secretary composed and typed (G-350, C-28). The "Purpose and Scope" of this agreement was "to define the terms of a crop share lease with options to buy" the desert land entries. Reed and Michener warranted "that a firm title can be furnished by them to section 16." As to the balance of the area, lessors warranted that the land was held under desert land entries and that title could be furnished upon the lessees furnishing a bona fide entryman as purchaser. It was agreed that the lessees could take a long-term renewable lease extended to the patent and supported by a mortgage covering the development costs on the desert land entries. The purchase price "per developed acre" varied between $200 and $250, depending upon the time the option was exercised.[2] The Lease-Option Agreement was signed and acknowledged by Masterson and Jolley on February 6, 1963, but not by Reed or Michener.

On February 11, 1963, Jolley and Ore-Ida, with the knowledge and consent of Reed and Michener, subleased for five years all of the land to O. J. Stewart, C. Douglas Stewart, and Paul Stewart (G-366). The distribution of the crops under the two leases would be:

	Reed & Michener	Jolley-Ore-Ida	Stewarts
Potatoes	¼	1/12	3/5
Grain	½	.....	½
Hay	½	.....	½
Alfalfa seed	½	.....	½
Beets	¼	1/12	3/5

The entrymen would receive no return from the crops.

[2]The agreement is described in greater detail *infra*, pp. 417, 418.

The leases did not specify acreage to be planted to any particular crop. Since the Stewarts were not required to plant either potatoes or beets, Jolley and Masterson were not assured of any income from the farming operations.

Reed and Michener called a special meeting of the entrymen for February 12, 1963, which was held that evening at Reed's store in Idaho Falls. The meeting was attended by all of the entrymen except Charles and Norma Barnes (G-4-38A; G-4-39). Reed and Michener advised the entrymen that they had given up hope of obtaining the small projects loan from the Bureau of Reclamation. They also advised that they were attempting to get private financing through the Travelers Insurance Company. The entrymen were informed by Reed and Michener that they had spent in the neighborhood of $1,000 on each entry and in order to proceed with the development of the project each entryman would have to pay $983 in cash and assume personal obligations of between $12,000 and $14,000. However, they were given an alternative. Reed and Michener would go ahead and try to develop the project with non-recourse notes, mortgages and leases to be signed by the entrymen, in which case the entrymen would receive $10 an acre for the land in their entries after patent. Schwarze, Bendixsen and Sargent decided not to participate further in the project and expressed a willingness to relinquish their entries.

V. The Initial Leases and Mortgages

Each of the entrymen signed a note (G-368, G-373), a mortgage (G-369), and a "Lease and Land Development Contract" (G-374), dated February 18, 1963. The notes were non-recourse for an amount

computed at $300 per acre on the total acreage in each entry payable to Indian Hill Irrigation Company on demand, and supported by a mortgage to Indian Hill in the same amount. The note specified that it was given to secure the entryman's obligation to pay for expenses incurred in the development of land described in a lease between the parties of the same date.

The "Lease and Land Development Contract" leased the entires to Indian Hill Irrigation Company for a term of 20 years. Each entryman was to receive a total rent of $10 per acre at the rate of $1 per acre per year. The rent would be reduced by $10 per acre "which is, as a result of administrative action of the Federal Government, dropped from the acreage originally applied for under lessor's desert entry application." The contract provided that the expenses for which the entrymen would be obligated to pay "shall be those necessarily incurred to bring the lands herein demised to a point of being tillable as irrigated land." Indian Hill Irrigation Company was obligated "to perform as a minimum obligation on its part, ample construction of the irrigation works for said project to meet the requirements for annual proofs with respect to" the desert land entry and to "bear the expenses * * * incurred for the purpose of raising crops thereon including the costs of plowing for planting, planting, cultivating, harvesting." Indian Hill had the option of terminating the agreement on 30 days notice without obligation to perform additional work upon payment of $50 less any rental paid prior to the cancellation. Indian Hill had the right to sublease or assign its rights "as it sees fit." Under the notes, mortgages and contracts, only the land was obligated for payment of development costs, not the entrymen.

After the execution of the notes, the mortgages, and the Lease and Land Development Contracts, Reed and Michener signed the "Lease-Option Agreement" that had previously been executed by Masterson and Jolley on February 6, 1963 (Tr. 1630, 1781). At about this same time, Reed induced Schwarze not to relinquish his desert land entry, as he had intended, because it was strategically located and essential to the development of the Indian Hill project (Tr. 1451-1452). Schwarze also signed the development contract with the Indian Hill Irrigation Company (Tr. 1453).

In January 1963, Reed and Michener were in contact with representatives of the Intermountain Gas Company (Tr. 488-489). Intermountain was particularly interested in promoting the use of gas engines to increase its sales during the spring and summer months when demand for gas was minimal. Intermountain induced Reed and Michener to change the planned irrigation system from electric power to gas and agreed to furnish the gas engines for the project. In a letter dated January 27, 1965, Reed and Michener agreed "to pay $0.10 per therm for natural gas * * * for irrigating our farm located in Twp. 6 S., R. 8 E. B.M., Owyhee County, Idaho," on condition that Intermountain furnish and maintain gas engines (G-342). The standard irrigation contract rate is 5½ cents per therm (Tr. 499). The additional 4½ cents was to be paid to compensate Intermountain for supplying the engines (Tr. 500).

J. R. McKinney, manager of the irrigation department of Intermountain, referred Reed and Michener to Charles R. Shearman as a possible source of financing the irrigation project. He introduced Reed to Shearman on February 15, 1963 (Tr. 508). Shearman was vice president and half owner of Hood Corporation

and in charge of its field activities. Hood was a substantial company performing extensive pipe construction work in the western States under both Government and private contracts, which included some with Intermountain.

Shearman talked with Reed and Michener about the Indian Hill project on February 15, 1963 (Tr. 508), and examined the area on the following day (Tr. 1288). Shearman was "quite interested and he was also interested in getting an entry himself, or several entries himself" (Tr. 1287-1288). After examining the February 18, 1963, notes, mortgages, and Lease and Land Development Contracts signed by the entrymen, Shearman "agreed to put the amount of money in the project that [Reed and Michener] had put in and become a part of the operation" (Tr. 1288).

The latter part of February, Indian Hill Irrigation Company and Intermountain Gas Company executed an agreement (G-341) which obligated Intermountain to furnish and install by May 1, 1963, engines of adequate horsepower to irrigate 1,200 acres. Indian Hill agreed to purchase all of its gas pumping requirements at the rate of 10 cents per therm and deposit annually in advance a minimum of $18,500. This agreement was signed on behalf of Indian Hill Irrigation Company by Wallace Reed and C. R. Shearman. At that time, Shearman told McKinney that "he was a part of the Indian Hill operation" (Tr. 507-508).

Intermountain had approached Hood Corporation about the installation of gas engines prior to the February agreement with Indian Hill Irrigation Company and, apparently acting upon the January 27, 1963 letter of Reed and Michener, requested Hood to install the engines at Indian Hill. Hood sent a telegram to

Nordberg Manufacturing Company of Milwaukee, Wisconsin, ordering the engine (G-173-1) and signed a contract with that company dated February 19, 1963, for the purchase of two gas operated engines at a cost of $133,225 (G-173-3). Hood Corporation subsequently assumed Intermountain's obligations to furnish the gas engines to the Indian Hill project under the February agreement. On June 4, 1963, Wallace Reed, on behalf of the Indian Hill Irrigation Company, assigned to Hood the 4½ cents per therm refund from the Gas Company (G-343).

The agreement or understanding between Reed, Michener and Shearman concerning Shearman's participation in Indian Hill was never reduced to writing. Michener testified that the arrangement was to "develop, assist in the development of the land" with Shearman "more or less a silent partner" (Tr. 1726) and that "he was interested in participating entirely in the project" (Tr. 1727). Reed testified that Shearman "became a part of the operation" (Tr. 1288) and that "we went in there to prove up on the land and grow a crop" with him and Michener doing the work and Hood Corporation furnishing the money (Tr. 1289). The anticipated income from the crop was to be shared between Reed, Michener and Shearman on an equal basis (Tr. 1288).

As a part of the arrangement, Reed made a deal with Shearman to pay Sargent and Bendixsen $5 an acre to relinquish their entries. In furtherance of this agreement, Reed prepared relinquishments (G-347, G-348) and obtained Sargent's and Bendixsen's signatures (G-383, pp. 97-98). Charles R. Shearman filed a desert land application on the Sargent entry and Ollie Mae Sherman (Charles' wife) on the Bendixsen entry

on February 25, 1963. (G-1, G-2). Reed filed the relinquishments on February 25, 1963. Bendixsen and Sargent were each paid $265 on March 21, 1963, by Hood Corporation (G-134, G-135) and $1,335 on January 22, 1965, for a total of $1,600, or $5 per acre for the 320 acres in each of their entries. Applications for desert land entries in Indian Hill were subsequently filed by other entrymen. Velma R. Blackwell, who became interested in the project through Shearman (Tr. 846), filed an application on July 18, 1963 (G-18). Margaret Nielsen and Roger B. Hougen, who acquired an interest through Reed (Tr. 1360, 1423), filed applications on July 16, 1963 (G-14, G-15).[3]

On March 1, 1963, Indian Hill Irrigation Company signed a contract with Hood Corporation to build the "necessary irrigation pumping plant, lift station and irrigation ditches to carry and distribute the irrigation water from the Snake River to said land, the initial phase of said program being the distribution of water to an initial 1,000 acres prior to May 1, 1963" G-111). The contract provided also that "the total compensation for such work and services is $125,000 which will be paid to [Hood Corporation] by [Indian Hill Irrigation Company] in full prior to May 1, 1963." At the same time, Reed and Michener executed a contract with Hood Corporation (G-112) in which Reed and Michener agreed "to complete all of said work [required by the Indian Hill-Hood construction contract] in accordance with the plans and specifications therefor by May 1, 1963," for a "total sum of actual cost plus $30,000, but not to exceed $117,000."

[3]The Indian Hill project ultimately included several additional entrymen (G-16, G-17, G-19, G-20, G-21).

The construction of the irrigation system was then begun under the supervision of Reed and Michener who moved to Hammett, Idaho. Jolley commenced clearing the land and the Stewarts, in early March, began leveling and disking the land preparatory to planting crops (Tr. 702). The penstocks to carry water from the Snake River to the project, the engines, and pumps were installed. Canals and ditches were dug. A gravity flow irrigation system was constructed and on May 2, 1963, water was first delivered to the land. On March 13, 1963, while work was in progress, entry to the land of Raymond T. Michener, Marjorie K. Michener, Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze, George L. Crapo, Norma E. Barnes, Charles E. Barnes, and Blaine L. Garn was allowed by the land office. Entry by the Shearmans was later allowed on October 29, 1963.

Difficulties with the project immediately developed. The gas engines failed to operate properly and delivery of water was often interrupted. The engines were later returned to the manufacturer and replacements were installed. Masterson became dissatisfied with Jolley's performance (Tr. 604). The Jolley-Ore-Ida Motors, Inc., partnership was, therefore, terminated on May 7, 1963 (G-340, G-352), and on May 31, 1963, Masterson, Jolley and Reed and Michener terminated their lease-option agreement. The Stewarts, however, continued with their farming operations under the terms of the sublease.

VI. Control by Hoodco Farms

By the middle of the summer of 1962, it became apparent the farming operation was not going to be successful. At that time, Hood Corporation had ex-

pended approximately $250,000 (Tr. 1645). Reed and Michener had lost their enthusiasm for the project and Shearman decided to take over the entire operation. Bernard M. Laulhere, president and co-owner of Hood Corporation, became concerned about the cost to Hood Corporation and sent the company's attorney, Morris Pfaelzer, to investigate (Tr. 1645). Pfaelzer arrived in Boise, Idaho, from his Los Angeles office in July 1963.

On July 16, 1963, Shearman, with advice by Pfaelzer, conducted negotiations to purchase the interests of Reed and Michener in the project. Pfaelzer left a conference between Reed and Michener and Shearman to study the Desert Land Law. He concluded from his examination that "whatever these men did, the one thing they couldn't do was to convey any interest in entries" (Tr. 1649). He advised the conferees that "you can discuss any kind of an arrangement you want here but first of all I am not going to be able to document it for you; and secondly, whatever you do you must comply with that section of the Act that inhibits your dealing in entries as though they were titles." (Tr. 1649). Reed, Michener and Shearman reached an agreement. They produced a memorandum notation concerning the agreement for Pfaelzer's inspection. This memorandum, written in longhand, stated:

4500 Ac. @ 50 225,000
Payoffs 25,000
200,000—Total price
5,000—down
25,000—when agreements signed
30,000—when 1st 1200 Ac. proven
70,000—when 3300 Ac. proven
70,000—when 5 years

Pfaelzer examined the document and asked Shearman if there was anything else to which they had agreed. He was advised that Reed and Michener were "agreeing they won't try to promote any other project of this nature within five miles of the Indian Hill project" (Tr. 1654). Pfaelzer thereupon wrote in longhand on the bottom of the memorandum the words, "No filings within five (5) miles of borders of above area." The memorandum was then signed by Shearman, Reed and Michener.

Although this memorandum is a record of an agreement between the parties involving almost a quarter of a million dollars, the terms of the agreement and the conditions were never reduced to a written contract form. Reed, Michener and Pfaelzer testified that the $200,000 indicated in the memorandum was the amount agreed to be paid to Reed and Michener. Although, Reed and Michener participated in the discussion and the agreement was, in turn, discussed with Pfaelzer and later explained to A. C. Kiser, none of them were able to explain what "payoffs 25,000," appearing on the memorandum, had reference to.

On July 16, 1963, Shearman issued a Hood Corporation check to Reed and Michener in the amount of $5,000. The memorandum on the voucher portion of the check recited:

> Down payment per verbal agreement this date on Section 16, T6S, R8E in Owyhee County, Idaho and all other interests agreed upon this date. (G-138)

On July 17, 1963, Pfaelzer employed A. C. Kiser, a Boise attorney, to document and implement the agreement reached between Reed, Michener and Shearman.

Kiser was told that Reed and Michener were interested in salvaging what they could from the project and that Shearman desired to purchase the land of the entryman. (Tr. 1941, 2016). Pfaelzer regarded this desire "as purely a pipe-dream at this point" (Tr. 1941). Shearman was willing to see that Reed and Michener were compensated for what they had put into the project but wanted to receive the land in return. Pfaelzer recognized that Shearman couldn't get the land "at least until after it was patented" (Tr. 1942). Pfaelzer asked Kiser to "make a thorough study of this to be absolutely certain that what was being done here was being done within the framework of the desert land law" (Tr. 1943). Pfaelzer also told Kiser that he wanted to separate the operations connected with the desert land entries from Hood Corporation's construction business to preserve Hood Corporation's credit rating (Tr. 1944-1945). Kiser was, therefore, requested to form a new corporation, to be known as Hoodco Farms, as a subsidiary to the Hood Corporation.

Between July 17 and August 15, Kiser produced a volume of documents. These included:

A. With reference to Hoodco Farms, Inc.

1. Articles of Incorporation (G-98).

B. With reference to Indian Hill Irrigation Company.

2. By-Laws (G-96).

3. Minutes of meeting of first meeting of incorporators predated March 10, 1961 (G-92).

4. Minutes of a meeting of stockholders predated January 21, 1963 (G-89).

5. Minutes of meetings of the directors predated March 10, 1961 (G-93), March 1, 1963 (G-91), June 21, 1963 (G-87).

6. Minutes of a meeting of stockholders dated August 14, 1964 (G-79).

C. With reference to Reed and Michener.

7. Offer to Reed and Michener dated August 31, 1963 (G-117).

D. With reference to the entrymen.

8. Agreements between Indian Hill Irrigiation Company and entrymen predated February 19, 1963 (G-229, G-241, G-252, G-258, G-270, G-283, G-293, G-305, G-316, G-330).

9. Notes from entrymen to Indian Hill predated February 19, 1963 (G-231, G-239, G-247, G-263, G-272, G-284, G-299, G-301, G-311, G-318, G-331).

10. Mortgages from entrymen to Indian Hill predated February 19, 1963 (G-233, G-237, G-249, G-260, G-268, G-296, G-314, G-321, G-329).

11. Notes from entrymen to Hoodco Farms dated August 15, 1963 (G-232, G-240, G-248, G-262, G-273, G-285, G-295, G-312, G-317, G-333).

12. Mortgages from entrymen to Hoodco Farms dated August 15, 1963 (G-238, G-250, G-261, G-269, G-297, G-313, G-320, G-328).

13. Offers from Hoodco Farms to entrymen dated August 15, 1963 (G-118 to G-125).

14. Pledges of stock and proxies from entrymen to Hoodco Farms (G-370).

15. Agreements by Michener, Reed and Shearman to assume 1963 obligations of entrymen under February 19, 1963 agreements (G-235, G-243, G-257, G-267, G-277).

16. Water certificates obligating Indian Hill to furnish water to entrymen predated to February 19, 1963 (G-236, G-244, G-271, G-294).

The Hoodco Farms Documents. Article of Incorporation of Hoodco Farms, Inc., were prepared and filed on August 5, 1963 (G-224). A Certificate of Incorporation was issued on the same day by the State of Idaho (Tr. 223).

The Indian Hill Documents. The documents with reference to the Indian Hill Irrigation Company were prepared to reflect the action which should have been taken by the company in order to be properly organized to conduct business, as well as the formal action which should have been taken in connection with the obligations and agreements of the company. The bylaws bearing a predated notarization of March 10, 1961 provided for the election of directors at an annual meeting of the stockholders, the powers and duties of the directors, corporate officers to be elected by the board of directors, the filling of vacancies among the directors by appointment by the remaining directors, and the issuance of stock certificates and the transfer of stock.

The minutes of the first meeting of the incorporators indicated that Reed, Sargent, Michener, Crapo and Schwarze had been elected directors on March 10, 1961. The minutes of the meetings of the directors indicated that Wallace Reed had been elected president, Hermen Sargent, vice president, and R. T. Michener,

secretary-treasurer, on March 10, 1961; that the board of directors had approved the contract with Hood Corporation for the construction and the irrigation system for $125,000 on March 1, 1963; that Wallace Reed had been elected president, C. R. Shearman, vice President and R. T. Michener, secretary-treasurer on June 21, 1963.

Minutes of the meeting of the board of directors held August 23, 1963, approved the form of agreement predated February 19, 1963, substituted Laulhere, Ryan and J. B. Walhof on the board of directors to replace Reed, Michener and Crapo, and indicated the election of Shearman as president, Laulhere as vice president, and Ryan as secretary-treasurer.

The February 19, 1963, agreements, notes and mortgages. The agreements, prepared for execution by Indian Hill and each of the entrymen, recite that Indian Hill holds title to "water rights, pumps, canals, and other irrigation facilities * * * which same facilities now exist and are suitable for pumping and delivering water * * *" and that "there is no available source of funds for paying the outstanding indebtedness * * * including sums owing or to become due and owing for the cost of construction, operations and maintenance * * *."

The entryman's obligation under the agreements would be:

1. To pay his proportionate share of all costs of pumping and delivering water, including power, maintenance, operating costs, ditch riders, taxes and insurance.

2. To pay any additional sum each year reasonable and necessary to create a depreciation reserve required for equipment replacement, the amount to be determined by mutual agreement.

3. To pay a proportionate share of any payments required to be paid by Hood Corporation including those for needed capital improvements on "the existing facilities owned by [Indian Hill]."

Indian Hill's obligation under the agreements would be:

1. To use any or all of the depreciation reserve funds to meet the annual payments owing to Hood Corporation "for the furnishing and installation of the irrigation facilities owned by [Indian Hill]."

2. To furnish the entryman with his proportionate share of the total water pumped by use of Indian Hill facilities, so long as that entryman made the required payments.

Each agreement recites that it "supersedes any and all other agreements heretofore entered into between the parties" and the note and mortgate therein referred to "shall govern all of the rights, duties and liabilities between the parties." The accompanying note was for $100 per acre with interest at 8 percent beginning one year after issuance of patent. It and the supporting real estate mortgage for the same amount were nonrecourse, the entryman having no personal liability. In the event of default the only remedy of Indian Hill would be to foreclose the mortgage.

The August 15, 1963, agreements, notes and mortgages. The agreements prepared for execution by Hoodco Farms, Inc., and each of the entrymen recite that the entryman desires to employ Hoodco Farms to develop and improve his entry as may be necessary to enable the entryman to make necessary proofs and "otherwise prepare said lands for cultivation and irrigation for the sum of $200 per irrigable acre." The entryman's obligation under the agreement was:

1. To pay $200 for each irrigable acre evidenced by promissory notes secured by a second mortgage, and

2. To surrender possession of his entry for a period of up to 20 years.

Hoodco Farms' obligation was to develop and improve the entry in such manner and within such time as may be required by the desert land laws to meet the requirements of such laws to obtain patent.

Hoodco Farms had the right to farm the land for a period of 20 years beginning in 1964; to elect not to farm the land and declare the note, less 5 percent of its face value for each year farmed, due and payable. Hoodco Farms also assumed all amounts due which the entryman was required to pay under the agreement dated February 19, 1963, except the taxes. If Hoodco Farms elected to discontinue farming, the entire balance of the note, less 5 percent for each year farmed, would become due and payable within one year and bear interest at the rate of 7 percent per annum. The accompanying note was for $200 per gross acres, secured by a mortgage in the same amount. The notes and mortgages were also non-recourse. Because under the agreements the entrymen would be liable for the water costs during the 1963 season, an "Assumption Agreement" was prepared for execution by Michener, Reed and Shearman under which they assumed these expenses.

The August 15, 1963, offers. The offers prepared by Kiser for each entryman, except Reed and Michener, recited that in consideration of the entryman's granting to Hoodco Farms the right to farm and develop his entry, Hoodco Farms offered to purchase the entry after patent and the entryman's stock in Indian Hill for $10 per acre, or $3,200 for a 320-acre entry. Hoodco Farms

agreed not to withdraw the offer for a period of six months after patent.

The offer prepared for Reed and Michener and their wives, after reciting that they had heretofore transferred to Hoodco Farms title to section 16 for $30,000, made three divisions of the entries. The first identified as Parcel I, consisted of the Raymond T. Michener, Wallace Reed, and Marjorie K. Michener entries. Parcel II consisted of the Charles E. Barnes, Norma E. Barnes, Crapo, Garn, Joseph L. Nielsen, Myrtle M. Reed, and Schwarze entries. Parcel III consisted of the Blackwell, Hougen, Nielsen, Ollie M. Shearman and Charles R. Shearman entries.

Under the offer, Hoodco Farms agreed to pay Reed and Michener $30,000 for the previously executed transfer of section 16; $27,200 at the time Hoodco Farms obtains title to 1,200 acres in either Parcel I or Parcel II; $44,000 at the time Hoodco Farms obtains title to all of the land in Parcels I and II; $26,000 at the time Hoodco Farms obtains title to the lands in Parcel III; and $70,000 to be paid in five equal annual installments after Hoodco Farms obtains title to all of the entries. The offer specified that Reed and Michener "shall not engage either directly or indirectly in the promotion or development of any desert land projects * * * within a distance of 5 miles of the [entries]."

The documents prepared by Kiser were delivered to Reed in late August. On August 31, 1963, Reed picked up William O. Kepler a notary public, and took him to the homes of the entrymen (Tr. 1413). The February 19 and August 15, 1963, agreements, notes and mortgages were signed by all, or most of the entrymen on August 31, 1963. None of the entrymen objected to the documents. Many signed without reading or under-

standing the contents, although Reed apparently, in at least some cases, explained their purport. Copies were not delivered to or requested by any of the entrymen. The first set of agreements recited that they were "made and entered into on February 19, 1963," and were notarized as having been signed on that date. None of the entrymen protested or raised objection to the predating of the documents.

Signatures were obtained on the bylaws and minutes of meetings prepared for Indian Hill Irrigation Company. The offers to the entrymen for the purchase of the entries after patent were signed by Shearman, attested to by Ryan, and delivered to Reed. These offers were not presented to the entrymen nor were they informed of their existence. Each of the entrymen signed a pledge of Indian Hill stock and a voting proxy to Hoodco Farms.

The executed stock pledge agreement gave Hoodco Farms control of Indian Hill Irrigation Company. The minutes of the meeting of the board of directors dated August 23, 1963, placed Hood and Hoodco Farms officials in charge of Indian Hill operations. The Indian Hill records had been delivered to Shearman, and Ryan, as secretary-treasurer of Indian Hill, set up and maintained the accounts in addition to his similar duties with Hood and Hoodco Farms.

VII. The Constructed Irrigation System

After the agreement between Shearman, Reed and Michener, Hoodco Farms took over the farming operation on Indian Hill project and continued the contruction and development of the irrigation system. The system now consists of a pumping plant on the Snake River powered by four natural gas engines, five vertical

turbine pumps, three 26-inch diameter pipes leading from the Snake River up the hill a distance of about 1,350 feet and discharging into a reservoir (Tr. 197). Two 20-feet lift canals lead from the reservoir, one extending west to a distance of about 6,700 feet on the boundary between entry 012241 and 012235 and traversing through entry 012234. The other canal extends south a distance of 9,000 feet through entries 012235, 012242, and section 16 (Tr. 196). Buried main lines located every 50 feet lead from the canals to which are attached lightweight aluminum pipe three and four inches in diameter. Gas powered booster pumps along the canals furnish the pressure for the irrigation sprinkler system (Tr. 197). The irrigation system is generally adequate to serve the lands within the entries as well as section 16 (Tr. 209).

The reasonable cost of the facilities now on the project, including the engines of the pumping plant on the river, pipeline up the hill, the reservoir, the canals, pumping facilities and the buried main lines and surface sprinkler lines is $948,618 (Tr. 214). The reasonable development cost, clearing of sagebrush, plowing and developing into irrigated lands would be about $105,740 (Tr. 215). This cost would cover 1,500 acres actually leveled and graded for surface irrigation. The estimated total value of the land development and the irrigation system would be $243 per acre (Tr. 218-219).

The irrigation system was not constructed so that the entires could be farmed as individual units (Tr. 230). Many of them do not have access roads and there are no rights-of-way for roads, canals and pipelines. No measuring devices were installed in the system by which water costs could be allocated (Tr. 220). The installa-

tion of measuring devices on each of the service lateral lines would be required in order to allocate water costs to the individual entries. Such an installation is not economically feasible (Tr. 231).

VIII. The Final Financial Agreements

On July 2, 1963, Wallace Reed, Joseph L. Neilsen, Schwarze, Myrtle M. Reed and Crapo signed notices of intent to make final proof. In accordance with the established procedure, the Boise Land Office Manager issued a "Notice for Publication" on July 10, 1963. The publication of notice of intent to make final proof was requested by Ryan in a letter to the Glenns Ferry Gazette dated July 17, 1963 (G-338), and paid for by Hoodco Farms on October 11, 1963 (G-146-1).

Since the Articles of Incorporation of Indian Hill stated, "the company cannot deliver water to anyone who has not purchased one share of stock of the corporation for each acre or fractional part thereof of irrigable land within the area served by the corporation" the land office on October 22, 1963, requested submission of certified copies of the shares of stock owned by the entrymen in Indian Hill in order to complete their final proof (G-11-35). The land office letter stated:

> Before your entry was allowed you submitted a statement saying that you had subscribed to 320 acres of the company. On your final proof you stated that you owned 320 shares of the company.
>
> It will be necessary for you to submit certified copies of the shares of stock owned by you in the Indian Hill Irrigation Company. Because of the strict and prohibitive wording in the company's articles of incorporation we cannot accept the water certificates as your legal and permanent evidence of a water right.

The stock certificates were then prepared by Hoodco Farms' attorney (Tr. 1989-1990) and were submitted by Reed on October 30, 1963. They were predated March 10, 1961, and signed by Reed as president. Reed was not, at the time of signing, an officer in Indian Hill. The certificates state they were "Fully Paid" and "non-assessable." The stock had never been fully paid by the entrymen. They made no payments that were designated as being for the purchase of stock. The entrymen's attorney submitted final proof for Wallace Reed, Myrtle Reed, Joseph L. Neilsen, Schwarze and Crapo on September 26, 1963 (G-9).

The Desert Land Law requires a payment of $1 per acre with final proof. Reed and Michener advanced money to make final proof (Tr. 1339). These advances were described as loans (Tr. 890-892; Tr. 1378-1379), but there is no evidence that repayment was ever requested or made.

On the basis of the Director's August 14, 1964, decision, patents were issued to Wallace Reed, Myrtle Reed, Schwarze and Crapo on September 3, 1964, and to Nielsen on September 12, 1964. The entrymen delivered their patents to Reed or Michener (Tr. 895-896; Tr. 1392-1395). They were in turn given to Ryan who sent them to the Owyhee County Recorder on September 23, 1964 (G-153) with Hoodco Farms checks to cover the recording fees (G-149, G-150). Ryan requested that the patents be returned to him. They were never returned to the patentees after recordation (Tr. 896; Tr. 1394).

Charles Shearman was killed in an airplane accident on March 27, 1964 (Tr. 1500). Up to the date of his death he was in control of the Indian Hill project, per-

sonally directing the installation of the irrigation system and the grading of the land (Tr. 1502). Laulhere succeeded to sole control of Hood and Hoodco Farms and subsequently obtained Shearman's interest (Tr. 1506). A few days after Shearman's funeral (Laulhere discussed the problems in Indian Hill with Harvey Proctor, vice president of Southern California Gas Company, with the intention of interesting him in taking over the farming operation (Tr. 1504). Proctor had agricultural experience as an operator of an orange grove in California (Tr. 1504). After visiting the area, Proctor, in late 1964, agreed to take over the farming operation and incorporated the Virginia Agricultural Products Company in California for that purpose. The company was wholly owned by Proctor and his wife. Virginia Agricultural purchased 20 percent of the stock of Hoodco Farms (Tr. 733). Proctor became executive vice president of Hood Corporation and president of Hoodco Farms in the early part of 1965 (Tr. 731). He assumed the supervision of the Boise operation of Hood and had full responsibility for the Indian Hill farming operation (Tr. 732).

Laulhere wished to obtain a loan for more than the $125,000 offered by Travelers Insurance. He opened negotiations with Northwestern Mutual Life Insurance Company seeking additional financing. On May 29, 1964, Northwestern Mutual Life Insurance Company made a commitment for a loan of $1,200,000 which was later, on March 8, 1965, reduced to $705,000 (C-4). Under Northwestern's commitment, the loan would be disbursed when 4,461 acres were patented of which not less that 3,525 acres were developed and equipped for irrigation. The commitment provided that if any entryman desired to repay all of his indebtedness to

Indian Hill Irrigation Company and Hoodco Farms during the term of the loan, his land would be released from the mortgage and assignment on payment of not more than $300 per acre plus a premium of 5 percent (C-4).

The initial portion of the loan was to be for $200 an acre on 753 acres owned by Hoodco Farms and 1,500 acres owned by the five patentees, rounded to a total of $460,000. The loan was to be secured by a real estate mortgage by Hoodco Farms to Northwestern on the section 16 land purchased from Reed and Michener, 753 acres of Hoodco's patented land, the mortgator's rights to 1,500 acres of land of the five patentees, the sprinkler system and irrigation facilities owned by Hoodco, assignment of all of the notes, mortgages and stock pledges of the five patentees, and a note from Indian Hill to Hoodco in the amount of $464,860. The loan was to be guaranteed by Hood Corporation and Laulhere. The proposed loan would be for 20 years to be paid in annual installments and bear an interest rate of 6 percent.

On January 22, 1965, Reed and Michener entered into a new agreement with Hoodco Farms concerning the entries (G-126). Hoodco agreed to pay Reed and Michener $17,419.17 for delivery to Virginia Agricultural of $10 per acre options on the entries of the five patentees; $24,386.33 for delivery to Virginia of $10 per acre options on entries of Charles E. Barnes, Norma Barnes, Garn, Marjorie K. Michener, Raymond T. Michener, Charles Shearman Estate and Ollie Shearman (provided that if Shearman entries are granted prior to January 1, 1983, these options need not be obtained), and $56,000 in five equal annual installments after obtaining these options; $29,596.80 for

delivery to Virginia of $10 per acre options on entries of Blackwell, Hougen and Margaret Nielsen to be paid on annual installments; and an additional $1,300 for the Hougen or Nielsen options. The total payment under the contract was $128,702.30.

On January 19, 1965 (prior to the new agreement with Hoodco), each of the patentees executed an option agreement and a deed of his entry to Virginia Agricultural (G-360 to G-364). The agreements granted Virginia Agricultural the option of purchasing the desert land entry for $10 an acre subject to the February 19, 1963 notes, mortgages, and agreements between the patentees and Indian Hill and the August 15, 1963 notes, mortgages and agreements between the patentees and Hoodco Farms. On January 22, 1965, Reed and Michener's attorney delivered the documents to an escrow agent, the attorney for Northwestern Mutual. The option was completed by Virginia Agricultural on March 9, 1965. The purchase money, amounting to $15,600, was deposited with the escrow agent on May 7, 1965 (G-356, G-359).

IX. The Good Faith of the Entrymen

The first two issues, (1) whether each entry was made and is maintained with no intent on the part of the entryman to reclaim the lands and is not maintained in good faith as required by section 1 of the act of March 3, 1877 (19 Stat. 377, 43 U.S.C. sec. 321), and (2) whether patents issued to Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo were erroneously issued or obtained by fraudulent or improper means, are related and will be discussed jointly.

The intent of an entryman under the Desert Land Law is a controlling factor as to good faith and legality of the entry. The law states (43 U.S.C. sec. 321), "It shall be lawful for any citizen * * * to file a declaration * * * that he intends to reclaim a tract of desert land * * *." "That intention is the very essence of the condition on which his entry is permitted." *Chaplin v. United States,* 193 Fed. 879, 881 (CA DC 9, 1912), *cert. denied,* 225 U.S. 705.

The Government contends that the entrymen had no intention of reclaiming at the time they filed their desert land applications as evidenced by the preparation of the application by Reed and Michener from facts not known by the entrymen, by acceptance of all planning of how their entries were to be reclaimed and irrigated by Reed and Michener, and by their lack of knowledge of the requirements for entry. The use of services of persons knowledgeable in reclamation of desert land and reliance upon them in the development of plans is not inconsistent with a bona fide intent to reclaim. At the time of filing of their applications the entrymen had before them a plan for reclaiming which, on its face at least, appeared practical and within their financial abilities. They were to obtain the necessary funds through a 40-year loan under the Small Reclamation Projects Act. If this loan had materialized the entrymen might well have reclaimed the land through their own collective efforts. At least they intended to do so.

Their intent, however, changed. This change occurred at the meeting of February 12, 1963. The entrymen there decided to abandon further efforts to obtain the reclamation loan and to follow another course. The

testimony concerning the meeting is somewhat indefinite. The witnesses were either reluctant to testify with specificity or had an inexact recollection of the discussion. The evidence definitely established (1) that the entrymen were presented with an alternative and (2) that one of their choices was to pay $983 in cash and assume a $12,000 to $14,000 personal risk. The other alternative was the signing of mortgages, notes and leases. A memorandum notation of the meeting made by Michener (G-367) stated:

> Proposal to develop ground through a Travelers loan explained by Wallace Reed. Members asked to decide within 10 days whether they wished to participate.
>
> In order to participate they would:
>
> Put up $983.00 in cash
>
> Assume 12—$14,000 risk
>
> If they did not participate members were asked to either relinquish their filings or sign mortgages, notes and leases covering the costs of development.
>
> Meeting adjourned at 9:30 p.m.

It is apparent, however, that the alternatives presented to the entrymen involved something in addition "to signing mortgages, notes and leases covering the cost of development." The entryment knew from the first that they were going to mortgage their entries as evidenced by the statement of "Financial Condition" made to the Bureau of Reclamation (C-16-2). Furthermore, it would hardly have been necessary to ask the entrymen whether, in order to continue to participate in the project, they preferred to pay $1,000 in cash and assume a personal risk of from $12,000 to $14,000, or to sign non-

recourse notes and mortgages. Two of the entrymen testified concerning payment of $10 per acre for their entries. Schwarze stated:

> At this meeing that you referred to that you asked me of, where the first agreements were signed, there was some discussion along that line, and as near as I can recall someone asked Wally at that meeting, "Suppose this thing really goes sour, the whole project is a failure, costs too much money, or something, not feasible, what will happen? And Wally, the words he used I don't remember but there was something about $10 an acre broughten up. He felt we could certainly realize that much out of it. Now that's real vague but I do have a recollection of $10 there brought up. There was nothing firm, I don't think anybody felt it could be interpreted as an offer in any way. (Tr. 1467-1468).

Garn was more definite. He testified:

> It was my understanding that Reed and Michener were going to go ahead and develop or try to develop the project on their own with their own money and they would pay us $10 an acre for ground undeveloped prior to patent. Now whether it was that way or not I do not know, but that was my understanding of it. (Tr. 1100).

He also stated:

> I knew I couldn't sell, or turn something over to them until I gained patent, and I didn't think it would be until after patent. But I didn't think I had any alternative on the matter. (Tr. 1101).

From this testimony it is apparent that acceptance of $10 an acre was tied in with the second alternative pre-

sented to the entrymen at the meeting and was made a condition for their participation which would account for Norma Barnes' statement that "it was my understanding from there on that I had lost my hopes of ever having the income from the land that I had ever anticipated" (Tr. 1018). This would also account for the fact that Schwarze, Bendixsen and Sargent decided to abandon further participation which would not have been otherwise logically motivated. The entrymen, therefore, abandoned their original intent and decided to deliver their entries to others for reclamation and to accept $10 an acre when title could be transferred to the developers. Each of the entrymen testified that they did not enter into any agreement to sell their entries, either before or after patent. In the sense that no formal or written agreement was executed, this testimony was undoubtedly true. Nevertheless, they reached an understanding with Reed and Michener on February 12, 1963, that they would sell after patent and for $10 an acre.

The existence of such an understanding or agreement provides motivation for subsequent actions of principals involved in the development of Indian Hill which would otherwise be inexplicable. These actions include (1) the agreement with Jolley-Ore-Ida Motors, (2) the agreements with Shearman, (3) the method of recording the Shearman transactions on the accounting records of Hoodco Farms, and (4) the documentation of the transactions. The existence of the understanding or agreement to sell for $10 per acre also explains:

(1) Why the figure of $10 per acre appears consistently and without variation throughout the subsequent developments and documentation—in the Feb-

ruary 18, 1963 Lease and Land Development Contract with Indian Hill (G-374); in the offers of Hoodco Farms to the entrymen of August 15, 1963 (G-118 to G-125); in the options to Virginia Agricultural of January 19, 1965 (G-360 to G-364); in the accounting records of Hoodco Farms (G-114).

(2) Why the entrymen would obligate their entries for $300 per acre without any obligation on the part of the developers to expend a stipulated amount on the project.

(3) Why the entrymen would execute series of documents without a single protest of record, in many instances without understanding the contents and without retaining copies for their own files.

(4) Why the patentees finally sold their entries for $10 per acre without an arm's length negotiation of the selling price or even any direct contact with the purchasers.

(5) Why Hoodco Farms rather than the entrymen paid the publication fee, the recording fee, and reimbursed some of the patentees for their payments made in connection with their entries.

(6) Why the patents were collected by Reed and retained by Hoodco Farms after issuance.

All of the foregoing actions are inconsistent with bona fide intent to reclaim the land for the entrymen's own use or their own maximum benefit.

The Jolley-Ore-Ida Agreement. Reed and Michener negotiated the "Lease-Option Agreement" (G-350, C-28) with Jolley and Masterson, obtained their understanding or agreement with the entrymen, and then signed the contract (G-4-23). The document provided in part:

Purpose and Scope

It is the purpose and scope of this agreement to define the terms of a crop share lease with options to buy the following described lands and filings in Owyhee County, State of Idaho, near Hammett, Idaho, to wit: [the Indian Hill entries and section 16].

Term

The term of the Lease-Option shall be five (5) years, except as modified under the provisions of "Options".

* * *

Availability of Titles

Lessors warrant that a firm title can be furnished by them to Section 16. As to the balance of the area, Lessors warrant that the same is held under desert land entries and that title can be furnished upon the lessees furnishing a bona fide entryman as purchaser. It is agreed that the Lessees may take a long term renewable lease extending to the patent and supported by a mortgage covering the development costs on the desert land entry.

Purchase Prices

It is agreed that the purchase prices per developed acre shall be as follows:

$200.00 to May 1, 1963.

$200.00 plus Lessors' 1963 crop share to January 1, 1964; providing that at least 500 acres have been purchased or long-term leased at this time, the options continue as follows:

$250.00 to May 1, 1964.

$250.00 plus Lessors' 1964 crop share to January 1, 1965; providing that a total of at least 1500

acres have been purchased or long-term leased by this time, the options continue as follows:

$250.00 to May 1, 1965.

$250.00 plus Lessors' 1965 crop share to January 1, 1966.

All of the above prices are subject to a 5 percent discount.

The Lease-Option Agreement also provided that Jolley-Ore-Ida was to receive three-fourths of the potato crop, one-half of the grain, one-half of the hay, one-half of the alfalfa seed, and three-quarters of the beets. Reed and Michener agreed to provide one serviceable road, to pay the cost of leveling the land and ditches, and $5 per acre for the first plowing. The agreement could be terminated by mutual consent of the parties, by Ore-Ida Motors upon notice by December 1, or by Reed and Michener if their gross return fell below $50 per cropped acre.

The Government contends (Gov't Brief, pp. 21-22, and Gov't Reply Brief, pp. 9-13) that the agreement was a contract to sell the desert land entries.[4] The contestees argue (Shearman Brief, pp. 14-17) that this was merely an agreement for the substitution of entrymen.

The agreement is so indefinitely worded as to leave the intent and purposes of the party open to construction. The terms "with options to buy" and "purchase prices," "leases or sales," and a stipulated "purchase

[4]The brief filed on behalf of the Government will be referred to as "Gov't Brief" or "Gov't Reply Brief;" that filed on behalf of Ollie Mae Shearman and the Estate of Charles R. Shearman, Raymond T. Michener, Marjorie K. Michener, Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and Hoodco Farms, Inc., as the "Shearman Brief;" and that filed on behalf of Charles E. Barnes, Norma E. Barnes, Blaine L. Garn and George L. Crapo as the "Barnes Brief."

price" as used in the agreement indicate an intention to sell. The stipulated amount of from $200 to $250 an acre is definitely directed to a sale of the entries. The payment for each 320-acre entry would be either $64,000 or $80,000 depending when the option was exercised. The parties could not conceivably have contemplated payment in this amount for the mere privilege of substituting bona fide entrymen. The substitution of a bona fide entryman would have been of no benefit to Jolley and Masterson. The agreement must, therefore, have contemplated either a sale of the entry or the substitution of entrymen under the control of Jolley and Masterson for entrymen controlled by Reed and Michener. In either case, Masterson and Jolley were looking toward the reclamation of the entries for the purpose of acquiring ownership.

The contestees argue (Shearman Brief, pp. 14-16) that the Masterson-Jolley agreement did not constitute an enforceable instrument in view of its loose and imprecise language; that, at most it constituted only a purported offer which, in fact, was never accepted; and that none of the entrymen had authorized Reed and Michener to sell their entries. This may very well be. But what we are here dealing with is the good faith and intent of the parties in their relationship with the Government. The evidentiary importance of the agreement does not lie in its legality or enforceability, but in what its execution discloses as to good faith and intent.

After the February 12, 1963, understanding, the entrymen signed leases under which they would receive $10 an acre for their entries. Reed and Michener were convinced that they had sufficient control of the entries or of the entrymen that they could execute an agree-

ment with Jolley and Masterson which gave Reed and Michener, not the entrymen, a share of the crop grown on the entries and which also provided for the payment to Reed and Michener, not the entrymen, of from $200 to $250 in the event of transfer of ownership of the entries. The subsequent developments demonstrate that they actually did have such control. When five patents were ultimately issued, Reed and Michener promptly delivered them to others and, in due course, delivered deeds to the entries for which the entrymen were to receive $10 per acre in accordance with the understanding and intent acquired at the February 12, 1963 meeting. Obviously, the entrymen had agreed to have others reclaim the land and to retain the benefits of reclamation other than the $10 per acre. They were no longer acting in good faith with an intent through their own efforts or ingenuity to reclaim the desert land in their entries. All of this occurred prior to March 13, 1963, when the entries were allowed by the land office and, for the first time, the entrymen had the right to make entry and begin reclamation.

The Agreements With Shearman. At the time that Reed and Michener signed the Masterson-Jolley lease-option agreement in February 1963, Shearman acquired one-third of the Reed and Michener interest. The Government argues that that interest at this point was the right to the development and the farming of the project which is equated with "ownership" (Govt. Brief, pp. 36, 106). The contestees claim that, "The record shows that any purported understanding among Reed and Michener and Shearman that amounted to a 'partnership' pertained only to the 1963 crop" (Shearman Brief, p. 48). What Shearman did acquire for his agreement to finance the project was one-third of the total interest he ob-

tained by his subsequent agreement in July, 1963 when he assumed the entire responsibility for the development of the irrigation system.

The July 1963 agreement between Shearman and Reed and Michener is evidenced by a longhand memorandum (*supra*, p. 27). This memorandum discloses an agreement by Shearman to pay Reed and Michener, with reference to an interest in 4,500 acres of Indian Hill land, $200,000 in installments with an additional $25,000 in "payoffs," and an agreement by Reed and Michener not to promote desert land filings "within five (5) miles of the borders of" the Indian Hill entries.

The contestees argue that the $200,000 was payment for the past services of Reed and Michener or "the amount Reed and Michener had in [the project] that Shearman was to recognize and payoff," (Tr. 1652; Shearman Brief, p. 20). But the agreement to pay $200,000 to Reed and Michener could not have been for what they had in the project. At that time, Reed's and Michener's contribution had been (1) the development of the engineering plans upon which they had placed a value of $12,000 in the report to the Bureau of Reclamation (C-16-2), (2) the construction of the irrigation system under a contract with Hood Corporation which would provide them with a hoped-for profit of up to $30,000 and which provided Hood with a possible profit of $8,000, and (3) a farming contract with Masterson and Jolley under which they expected to receive a return on a share of the crop. Shearman would hardly have been willing to pay $200,000 for the engineering and planning activities of Reed and Michener and their disappointment at not making a profit of the construction and farming contracts when Shearman himself had shared in that disappointment.

The memorandum agreement, however, is fully explained by one of the documents drafted to make that agreement effective. The August 31, 1963, offer from Hoodco Farms to Reed and Michener (G-117) shows on its face what the $200,000 payment was for. Under that document, Hoodco Farms agreed to pay Reed and Michener:

$30,000	for Section 16
27,200	for delivery of title to 1,200 acres of land in the entries
44,000	for delivery of title to an additional 1,840 acres
96,000	for delivery of title to the remaining land in the Indian Hill project, $26,000 to be paid upon performance and the remainder to be paid in equal annual installments.

The agreed payments total $197,200. Kiser, who prepared the document, testified that the difference between $197,200 and the $200,000 is represented by the $2,800 offer made to Myrtle Reed in another document (Tr. 1981). Other documents executed by Hoodco Farms at the same time offered to pay the entrymen $10 per acre for title to the land in their entries, which explains the "payoffs 25,000" in Exhibit G-115. The entrymen executed the notes, mortgages and agreements dated February 19, 1963, and August 15, 1963, which effectuated the July 1963 agreement between Reed and Michener and Shearman and placed Shearman in complete control of the land. This constitutes further proof of lack of intent of the entrymen to reclaim.

Recording of the Transactions. There is further substantial evidence of the ultimate purpose of the documentation. The financial liability that resulted was recorded on the books of Hoodco Farms by Ryan. Under date of August 31, 1963, Ryan made the following entry in the accounting journal of Hoodco Farms (G-114-1):

Date	Item description	Debits	Credits
Aug. 31	Irrigated land-owned	$244,312	.....
	Contracts payable		$232,000
	State contracts		12,312
	To record the accepted offer of Hoodco Farms, Inc. to Wallace Reed, Raymond T. Michener et al. for purchase of lands.		

The $12,312 is the unpaid amount due to the State of Idaho for the section 16 land. The $232,000 credit represents the $197,000 agreed to be paid to Reed and Michener and the $10 per acre agreed to be paid to the entrymen. This amount was posted as a liability on ledger accounts (Account No. 203) entitled "*Contracts Payable*" under the names of the individual entrymen as follows:

Exhibit No.	Contracts payable	Amount
G-114-47	Charles E and Norma E. Barnes	$ 6,400
G-114-48	Warren J. Bendixsen.....	1,600
G-114-50	Velma R. Blackwell.....	3,200
G-114-53	George L. Crapo.....	3,200
G-114-54	Blaine L. Garn.....	3,200
G-114-55	Roger B. Hougen.....	3,200
G-114-56	Joseph L. and Margaret Nielsen	6,400
G-114-57	Reed and Michener.....	197,200
G-114-58	Myrtle M. Reed.....	2,800
G-114-59	Charles H. Sargent.....	1,600
G-114-60	Robert R. Schwarze.....	3,200
Total	.....	$232,000

The $244,312 appears on Hoodco Farms' Balance Sheet of October 31, 1963 (G-209), as:

Irrigated Land-Owned

5.228.8 Acres at 46.19—$244,312.

Ryan testified he had no information that the offers of August 15, 1963, had been accepted (Tr. 349, 1698) and made his entries on the assumption that they would be (Tr. 349). The contestees contend that the bookkeeping entries should not be accepted as reflecting a sale of the entries over the testimony of several witnesses that the entrymen had never sold or contracted to sell their entires prior to patent (Shearman Brief, pp. 30-32). Ryan's bookkeeping entries would not create any liability for Hoodco Farms that did not otherwise exist. Nevertheless, they disclose what was or was to be achieved by the execution of the documents prepared by Kiser in July and August 1963. Ryan clearly stated the intent in Hoodco Farms' books by the entry that the purpose was "to record the accepted offers of Hoodco Farms due to Wallace Reed, Raymond T. Michener et al. for the purchase of the lands." At the time Ryan made this entry he was in a position to know what was intended by the agreement between Reed, Michener and Shearman. He was an officer in the company.

At the time the entrymen were permitted to make entry they did not intend through their own efforts, to reclaim the desert land in their entries. What they did intend was to transfer possession and control for reclamation by and for the benefit of Hoodco Farms.

The contestees point to the fact that none of the documents can be construed as a contract to sell any of the Indian Hill entries (Shearman Brief, p. 29) and

argue that this is indicative of the good faith of the entrymen. Since the entrymen were well aware that they could not make executory contracts to convey title to their entries it would have been strange indeed if they had done so. But the absence of such agreements does not preclude inquiry into the purpose and results of the documents that were executed.

Those documents placed Hoodco Farms in a position, as a practical matter, of forcing a sale of the entries after patent. Hoodco Farms could elect not to continue to farm the entries. Such an election would require payment by the entrymen of their notes (amounting to $96,000 in the case of a 320-acre entry). They were not in a financial position to do so. Even if they had been financially able to retire the notes, ordinary prudence would have prevented such action. Considering the results for the entrymen as a group, the notes for 3,688 acres would have required payment of a little over $1,100.000. For this, the entrymen would have received unencumbered possession of their entries. They would have received stock and become only part owners of the Indian Hill Irrigation Company since, by then, the project had been expanded to include several other entrymen. The Indian Hill Irrigation Company would own part of an irrigation system valued, according to Indian Hill's Balance Sheet as of June 30, 1965, at $481,130.10. Hoodco Farms would own the engines and the laterals necessary for operation of the system. As part owners of a part of an irrigation system, the entrymen would have been in a position of having to negotiate with Hoodco Farms for the purchase or rental of the remaining portions of the system.

Even after obtaining the use of the remaining portion of the system, the entrymen still could not farm their lands without further substantial expenditure. Since the system had never been designed to permit farmining of individual entries, it would have had to be reconstructed and meters would have to be installed. In addition, the entrymen would have had to construct access roads to serve their entries. Any individual entryman who wished to redeem his entry would be in a far more unfavorable position. He would have had to bear all of the reconstruction and road building costs. The expense involved makes the redemption economically unsound.

The documentation of the transaction between the entrymen and Hoodco Farms gave the corporation the power of acquiring the entries after patent had been issued. The offers of August 15, 1963, and the mortgages, notes and agreements dated February 15 and August 15, were drafted for the purpose of achieving by indirection what the Desert Land Law proscribed.

The contestees assert that to prevail on the issue of bad faith the Government must prove that the entrymen intended to enter as dummies for others at the time of filing their applications and that a change of intent after application is immaterial (Shearman Brief, p. 32). They rely upon *Williamson v. United States*, 207 U.S. 425, 460, 461 (1908) and *United States v. Biggs*, 211 U.S. 507, 521 (1909).

The *Williamson* case, *supra*, arose on a charge of conspiracy to commit a subornation of perjury under the Timber and Stone Act. The perjury was based upon an affidavit required by the Commissioner of the General Land Office in relation to final proof, which

affidavit was not provided for in the statute. The Supreme Court held that the Commissioner could not require such an affidavit in the absence of a provision in the statute and, therefore, dismissed the charge. The Court stated:

> It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be construed as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it.
>
> * * * Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right.

In the *Biggs* case, *supra,* the Government sought to prove a conspiracy to defraud the United States on the basis of a contract to sell a Timber and Stone Act entry which was entered into after entry but prior to patent. The Court said:

> It is insisted by the Government that, however conclusive may be this ruling as to the power of the applicant to sell after application and to perfect his entry for the purpose of enabling him to perform such contract, that such ruling does not conclude the contention that a conspiracy formed

> to induce an entryman who has made his application to purchase subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the *Williamson* case was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after patent.

The Timber and Stone Act (20 Stat. 89 (1878)) since repealed (69 Stat. 434 (1955)), unlike the Desert Land Act, contained no expression of congressional intent to restrain alienation after entry. However, aside from this distinction, the Court assumed that the entryman had acted in good faith or had complied with the requirements of the statute. Neither of the decisions is factually analogous to the instant proceeding. Neither would support the conclusion that an understanding or agreement to surrender possession and control of a desert land entry for reclamation and ultimate acquisition by a corporation would receive the blessing of the Court.

Both the *Williamson* case, *supra,* and the *Biggs* case, *supra,* were discussed and construed in *Chaplin v. United States,* 193 F. 879 (CA DC 9, 1912), *cert. denied,* 225 U.S. 705 (1912), a criminal prosecution for conspiracy to defraud. In *Chaplin,* the Court states (at page 882):

> The cases of *Williamson v. United States,* 207 U.S. 425, 28 S. Ct. 163, 53 L. ed. 278, and *United States v. Biggs,* 211 U.S. 507, 29 S. Ct.

181, 53 L. ed. 305, cited by the plaintiffs in error, decided no principle applicable to the case at bar. In the *Williamson* case it was held that under the Timber and Stone Act, after an applicant has made his preliminary sworn statement concerning the bona fides of his application, and the absence of any contract or agreement in respect to the title, he is not required to swear again to such facts on final proof, and that a regulation of the Land Commissioner exacting such an additional statement at the time of final hearing is invalid. * * * In the *Biggs* case it was held that, while the Timber and Stone Act prohibited an entryman from entering land ostensibly for himself but in reality for another, a conspiracy formed to induce an entryman who has made in good faith his allegations to purchase subsequently to agree to convey his interest in the land was no violation of the statute. In *Adams v. Church,* 193 U.S. 510, 24 S. Ct. 512, 48 L. ed. 769, under the provisions of the Timber Culture Act, which act, as does the Desert Land Act, requires the applicant to make affidavit that his entry is made for the cultivation of timber for his exclusive use and benefit, and that the application is made in good faith and not for the purpose of speculation or for the benefit of another person, the Court recognized the right to assign "if the entryman has complied with the statute and made the entry in good faith in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law." In brief, it is clear from the authorities that an entry upon the public

lands made not in good faith, or in evasion of the provisions of the law, is a fraud upon the government and a combination of two or more persons to induce others to make such entries is a conspiracy punishable by section 5440 of the Revised Statutes (U.S. Comp. St. 1901, p. 3676).

Jones v. United States, 258 U.S. 40 (1922), is a suit brought to recover the value of lands allegedly obtained from the United States through fraudulent inducement and deals with a situation similar to this case. Justice Holmes, speaking for the Court, stated (at pp. 47-48):

> We may assume for the purposes of decision that the agreement and mortgage were not unlawful on their face and that the defendant took pains to make them known to the authorities; but obviously they might be made an instrument for the scheme alleged. They were prepared in contemplation of a plan to collect old soldiers for the purpose of making entries, the defendant paying an agent five dollars a piece for every contract brought in. The defendant admitted that he looked to the land, not to the soldiers, as his security and that he supposed the soldiers would sell the land to pay their debt to them. The land was timber land. There was evidence that the soldiers were not intending to make their residence upon it; that the agent employed to get their contracts knew that they were not intending to; that the defendant treated the intent as matter of indifference, and in his conversations with the agent indicated an expectation to get the land for himself or his nominees without the need for a preliminary con-

> tract to sell to him. He did get four of the nine parcels. Without going into details it is evident from the way in which the whole business was transacted that all hands proceeded on the notion that if the entrymen put in a periodical appearance on the land they would get it, and that no one troubled himself about actual intent provided the affidavits were in due form. It is impossible to say that the evidence did not warrant finding the defendant guilty of fraud.

At the time that entry was made on the desert lands on Indian Hill the entrymen were not acting in good faith but with intent to evade the provisions of the law. The patents were, therefore, erroneously issued and obtained by fraudulent and improper means. As the Court stated in the *Chaplin* decision, *supra*, "It is clear from the authorities that an entry upon the public land made not in good faith, or in evasion of the provisions of the law is a fraud upon the government."

X. The Holding by a Corporation

The next two issues, whether the agreements, notes and mortgages between the entrymen and Hoodco Farms, Inc., constitute prohibited assignments to or for the benefit of the corporation in violation of section 2 of the act of March 28, 1908 (35 Stat. 52, 43 U.S.C. sec. 324), and whether Hoodco Farms, Inc., holds in excess of 320 acres in violation of section 7 of the act of March 3, 1891 (26 Stat. 1096, 43 U.S.C. sec. 329), are related and will also be considered jointly.

Section 2 provides that "no assignment * * * shall be allowed or recognized except to an individual * * *; but no assignment to or for the benefit of any corpora-

tion or association shall be authorized or recognized." Section 7 provides that "no person or association of persons shall hold by assignment or otherwise prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert lands."

There is no question but that an entryman under the Desert Land Law has the right to mortgage his entry to either an individual or a corporation as asserted by contestees (Shearman Brief, pp. 51-58; Barnes Brief, p. 26). *Hafemann v. Gross,* 199 U.S. 342 (1905); *Whitney v. Buckman,* 13 Cal. 536 (1859); *Bashore v. Adolf,* 238 Pac. 534 (Idaho 1925); *Worthington v. Typton,* 172 Pac. 1048 (N.M. 1918); *Robert v. Hudson,* 173 Pac. 786 (Wyo. 1918). In fact, the regulations of the Department expressly recognized such right (43 CSR 2226.0-3(a)). There is likewise no question but that an entryman has the right to hire others to perform the work necessary for reclamation of the entries. He is not required to reclaim an entry by his own hand. *In re Henderson,* 21 Hawaii 104 (1912); *Williams v. Kirk,* 38 L.D. 429 (1910). But it does not logically follow that a mortgage to a corporation coupled with a contract to reclaim under a long term lease cannot constitute an assignment or cannot result in a holding by the corporation.

The contestees take the position that the agreements, notes and mortgages between the entrymen and Hoodco Farms constitute a security transaction only and were not, therefore, assignments (Shearman Brief, pp. 51-52; Barnes Brief, p. 29). To determine whether an assignment was made one must look to the results of the documents rather than to the labels the parties select for their designation. "The courts look beyond mere

names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect." *Arbuckle v. Gates*, 95 Va. 802, 30 S.E. 496 (1898). In this case, through the agreements, notes and mortgages, Hoodco Farms acquired:

1. The right to exclusive possession of the entries for a period of 20 years.

2. The right and obligation of reclaiming the land by grading and leveling and constructing an irrigation system.

3. The right to operate the irrigation system.

4. The exclusive right to farm the land and retain the proceeds from the farming operation.

5. The right to pledge the entries to secure loans. The question then is whether the transfer of these rights and obligations to the corporation constitutes an assignment and results in a holding within the meaning of the statute.

The parties agree that the words "assignment" and "hold" have no precise meaning but must be construed in the context in which they are used (Shearman Brief, p. 61; Gov't Reply Brief, p. 65). The contestees argue that the statute intends to prohibit the acquisition by a corporation of title to the land and that a transfer of anything less than the whole interest in the entry would not constitute an assignment or result in a holding by the corporation. But, in legal usage, "assignment" is used in some contexts to designate a transfer of the entire estate in land, in others, to refer to the transfer of only a partial interest. "Hold"

is variously used with similar dual or multiple connotations. But reading sections 2 and 7 of the Desert Land Law together and particularly in the light of other provisions (section 5, for example, providing that the person so entering shall expend the $3 per acre in reclaiming), it appears that Congress intended to prevent a consolidation of entries and to exclude corporations from control and reclamation of the entries. The words in section 7, "no person or association of persons shall hold by assignment or otherwise" clearly indicate a prohibition against a holding by any means whatsoever. Consequently, the words "assignment" and "hold" should be given a construction that will make the apparent purpose of the act effective.

United States v. Trinidad Coal and Coking Company, 137 U.S. 160 (1890), was an action under the Coal Lands Act to cancel patents allegedly issued on fraudulent misrepresentation. The act provided that no association of persons could hold more than 320 acres of coal land. The officers and employees of the defendant corporation entered separate tracts of coal lands which were subsequently used by the corporation. In answering an argument that this was permissible under the statute, the Court said (at pp. 166-167):

> * * * This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in

> the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than 320 acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. * * *

In *United States v. Keitel*, 211 U.S. 370 (1908), the Court, in considering the same question, stated (at p. 390):

> * * * It is a misconception to assume that there is any real identity between a purchase made by a qualified person in his own name and for himself with a purchase made by such person ostensibly for himself but really as the agent of a disqualified person. In the one case the person securing coal land from the United States for himself is free to dispose of the land after acquisition as he may deem best for his interest and for the development of the property acquired. In the other case the ostensible purchaser acquires with no dominion or control over the property, with no power to deal with it free from the control of the disqualified person for whose benefit the purchase was made.

The Court, in these cases, looked to the person receiving the benefit of the entries in determining whether there was a holding of more than 320 acres and whether the result was fraudulent.

Assignment as used in sections 2 and 7 is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries. The acquisition of such interest constitutes a holding within the meaning of the

statute. In this case, the right to possess, reclaim, farm, retain the farming proceeds and pledge the entries, gave Hoodco Farms complete dominion over the entries for a period of 20 years and constituted a prohibited assignment and holding in escess of 320 acres of desert land.

XI. Expenditure on the Entries

The next issue presented is whether each entryman has failed to expend the amount required by law necessary for irrigation, reclamation, and cultivation of the lands as required by section 5 of the act of March 3, 1891. This section provides:

> No land shall be patented to any person * * * unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation * * * thereof, * * * at least $3 per acre.

The entrymen, with the exception of Reed and Michener, did not spend $3 per acre of their own funds, pledge their personal credit, or become personally involved in the reclamation of their desert land entries. Hoodco Farms supplied all of the money expended to meet the $3 per acre expenditure requirement. The Government takes the position that the entryman has to become personally involved in the expenditure requirement in order to meet the provisions of the statute (Gov't Brief, pp. 119-121). The contestees contend that the source of funds is immaterial (Shearman Brief, pp. 63-69). Both turn to the legislative history, finding support in the House Report No. 1888, 49th Cong. 2d Sess. 2 (1886), which reads:

> The tide of emigration which flows in increasing volume upon this desert territory demands that

> the law be so framed and administered that titles may be acquired by those who in good faith brave the hardship of the frontier and by expenditure of time and labor successfully reclaim the desert waste.
>
> * * *
>
> * * * [B]y amendment to the existing law, the Committee has sought to cure the existing mischief of the present law and advance the interests of the public and the settler.
>
> * * *
>
> Time and experience will doubtless suggest still further improvement, but the amendments now proposed, if enacted into law and properly administered, will prevent holding of land thereunder without reclamation and for mere speculation. Failure to annually spend the required sum in reclamation when met by prompt loss of the land and forfeiture of moneys paid will afford no opportunity for the abuses which now exist, but will render it certain that in the large majority of cases the object of the law will be promptly and successfully accomplished. [H.R. Rep. No. 188, 49th Cong., 1st Sess. 2-3 (1886)].

The Government concludes that the foregoing indicates that "personal involvement in the reclamation of the land was intended and assumed by Congress;" the contestees that "the intent of the amendment was to deal not with the *source* of funds, but rather to insure that reclamation did in fact take place."

It is not necessary to attempt to read the intent of Congress from the legislative history. "The meaning of [the] words considered alone is clear." *United States*

v. Hammers, 221 U.S. 220 (1911). "No land shall be patented to any person unless *he or his assignors shall have expended* * * * $3 per acre." Other sections of the act of March 4, 1916 (38 Stat. 1161, 43 U.S.C., sec. 335) allows an extension of time within which proof may be filed if "* * * the entryman * * * has, in good faith, complied with the requirements of the law as to yearly expenditures and proof thereof." The Act of February 25, 1925, 43 Stat. 982, 43 U.S.C., sec. 336, allows a further extension if "* * * the entryman * * * has in good faith complied with the requirements of the law as yearly expenditure and proof thereof * * *." In passing the Desert Land Law, Congress looked to the entryman for expenditures and proof.

The requirement for personal expenditure of funds was dealt with *In re Henderson*, 21 Hawaii 104 (4th Cir. 1912). The Court said (at pp. 117-118):

> * * * It has been argued that the clause in question does not provide that the cultivation shall be done by the freeholder, and that as the land was under cultivation at the time the appellee acquired it, the condition was at once fulfilled. Although the clause does not expressly so state, it must be construed to mean that the cultivation is to be performed by the freeholder. We do not mean by this that it is necessarily to be done by the freeholder with his own hands, but that it must be done by him or by his servants or agents for him. The crops grown must be his crops and not those of another. A different construction would not accord with the spirit and intent of those portions of the Land Act of 1895 (R.L. Chap. 22) relating to the homesteading of public

> lands of which the provisions relating to "cash freeholds" are a part. The general purpose and intent of those portions of the statute may be briefly stated to be the settlement and occupation of agricultural and pastoral lands by citizen farmers, and the encouragement of the diversification of local industries, for the social, political and material benefit of the country. * * * To this end * * * he is expected and required to cultivate the land for it is for that very purpose that he is supposed to have applied for it. It is with that object in view that the government offers such lands to settlers at less than their full value and requires them to make oath that they apply for the land solely for their own use and benefit.

In *Salina Stock Co. v. United States,* 85 F. 339 (8th Cir., 1898), the Government brought an action to vacate two desert land patents granted to Edward A. Franks and Nellie Franks. The facts are analogous to those present in the current proceeding. The Court, in sustaining the action, stated (at p. 341):

> The Franks resided in the city of Salt Lake, Utah more than 100 miles from this land. They were people of very limited means. One Samuel H. Gilson, who was connected with this stock company, and perhaps its vice president * * * suggested to Edward A. Franks the idea of locating this land. He * * * induced Mrs. Franks to enter into this scheme. Neither of the Franks had ever seen the lands at the time of their application, and from that day to the making of the final proofs they were never on the land. When the time arrived for making the final proofs

they were taken to the lands by one Ferons, who was the surveyor for the Salina Stock Company. On arrival at the lands they met Mr. Ireland, who was one of the promoters of the defendant company, its manager, and later its treasurer. They were hauled about over the land, and shown some irrigating ditches, into which some water was turned for exhibition, to enable the Franks, without much strain of conscience, to swear that they had seen water running in the ditches. The land was then fenced and in the control of Ireland, and the ditches, whatever were there, had been made without the knowledge of the Franks, and without any expense to them. The evidence does not show that they had ever obtained any water rights, by grant or otherwise. They were on the land but a few hours. They were then taken back to Salt Lake City, where they made the required affidavits for final entry, swearing to everything according to the form of the depositions requisite to perfect the entry. When they left the lands said Ireland gave Edward Franks a letter to one Chambers, directing Chambers to pay Franks. The sum so received by Franks amounted to about $215, which covered his and Mrs. Franks' expenses in going to and from the land, and presumably to compensate them for the use of their names and their trouble. Taking the whole testimony together, there can be no doubt that the Franks never paid one dollar of the money on the entry of this land. Afterwards they made to the company quitclaim deeds to the lands, with a nominal consideration expressed therein.

The decisions in the *Henderson and Salina Stock Co.* cases, *supra*, disclose the Court's concern with the entryman's failure to expend funds or make a personal contribution to the reclamation of the land.

The contestees cite *Conway v. United States*, 95 F. 615 (8th Cir., 1899) and the Departmental decision in *Williams v. Kirk*, 38 L.D. 429 (1910), as establishing the immateriality of the source of funds in reclaiming desert land.

Conway v. United States is an action brought by the United States to recover the value of timber alleged to have been wrongfully cut from an entry under the Homestead Law. The entryman entered into a contract with Conway to clear and cultivate the land in the entry, construct a frame dwelling and other buildings in exchange for the timber. The Court concluded that the homestead entryman contracted in good faith to have the entry cleared of timber for purpose of preparing the land for cultivation. The Court concluded (p. 619) that "the question is one of good faith on the part of the settler." The decision in this case is, therefore, distinguishable. The action taken by the homestead entryman in the *Conway* case was for the purpose of settlement and cultivation of the land by the entryman as opposed to reclamation for the benefit of a corporation. The entryman was personally involved in the expenditure for reclamation. He traded a valuable asset he acquired with his entry, the timber, for the work required in effecting reclamation.

In the *Williams* decision, a contest between Kirk and Williams, a competing claimant, the Department held (at p. 435):

> * * * It is objected by contestants that Mrs. Kirk put no improvements on the land and that

whatever may have been paid on the water right was not paid from her own funds, but by her brother McCune, if paid in fact.

If this were true, so only the required sum was paid for her, with view to her entry, in a way and for a purpose honestly intended to effect reclamation of her land, the requirement of law is satisfied. The object of the law is to effect reclamation of arid land and make it productive. One may properly aid his kindred or even a friend or person to whom his benevolence, affinity, duty, benignity, or confidence in a promise to repay, moves him, so long as he does not seek indirectly in this way to obtain title. Of these necessary requisites there is no room to doubt. The water company has expended more than three dollars per acre for all the entries within its projected lines, it has credited the necessary sum as paid by or for Mrs. Kirk, the works undertaken were obviously undertaken and money expended in a way and for a purpose honestly intended to effect reclamation of Mrs. Kirk's land, as well as other in that vicinity. In *Bedford v. Clay,* affirmed by the Department (unreported), your office held that:

"This office can not seek the source of money expended for purposes of reclamation or determine private interests under indefinite contracts with reference to such work. These are matters for local courts. Sufficient it is if an entryman causes, in good faith, expenditure of the required amount in permanent improvements for the purpose of reclaiming the entered land."

This is the rule applicable. * * *

The contestees do not come within the rule. The Department "cannot seek the source of money expended for the purpose of reclamation" "if an entryman causes, *in good faith,* expenditure of the required amount in permanent improvements for the purpose of reclaiming and entering the land." The evidence in this case discloses that the entrymen did not act in good faith and that Hoodco Farms, not the entrymen, caused the expenditure to be made for the reclamation.

The *Williams* decision makes clear that it was not intended to give effect to any illegal contract or understanding by the entryman in the concluding instructions to the Commissioner of the General Land Office (at p. 438):

> The conclusion here reached merely disposes of the contest and is not intended to give effect to any illegal contract or understanding, either through the agreements hereinbefore referred to or to any private understanding aside from or under them. In passing upon proofs which have been offered on these entries you will be free to make such investigation as is necessary respecting such matters, so that it may be satisfactorily shown that the law has been fully complied with and in no respect evaded or violated.

Except for Reed and Michener, the entrymen did not expend $3 per acre in the reclamation of their entries and, with the exception of Reed, Michener and Shearman, their only contribution to the reclamation was affixing their signature to documents which resulted in no personal liability.

XII. The Secretary's Right to Act

The next issues are whether the entrymen are, as a matter of law, entitled to their entries and whether the Government is, by the stipulation and the record upon which the Director's decision of August 14, 1964, was based, restricted to that record.

As previously stated, the prior proceedings and the Director's decision were based upon a stipulation which provided that "the matters in dispute as set forth in a complaint and answer filed herein with respect to the desert entries in question may be determined upon the record and the evidence set forth in the stipulation." The Secretary, upon recommendation of the Solicitor, thereafter set aside the Director's decision, ordered a rehearing of the matter and a recommended decision by the Hearing Examiner. The contestees assert:

1. The Administrative Procedure Act and the regulations of the Department of the Interior preclude further actions by the Department (Shearman Brief, p. 73).

2. The Government is estopped to deny the validity of the decision and order of August 14, 1964 (Shearman Brief, p. 75).

3. The issues are *res judicata* (Shearman Brief, p. 77).

4. Due process of law demands that the entrymen receive and retain their patents (Shearman Brief, p. 83).

5. The Government is bound by the stipulation and the record in the previous proceeding (Shearman Brief, p. 71).

Section 3 of the Administrative Procedural Act (43 U.S.C. 1002) to which this proceeding is subject (*Adams v. Witmer*, 271 F. 2d 29, CA DC 9 (1959); *United States v. O'Leary*, 63 I.D. 341 (1956)) states:

> * * * Every agency shall separately state and currently publish in the Federal Register * * * statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures [and] * * * substitutive rules adopted as authorized by law * * *. No person shall in any manner be required to resort to organization or procedure not so published.

Contrary to the contestees' assertion, the Secretary has, in compliance with this provision of the Administrative Procedure Act, reserved by regulation the right to consider and correct decisions of the Director which have become final. Title 43 CFR 1843.9 provides:

> When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed *except for fraud or for gross irregularity.* (Italics added.)

The Secretary acted pursuant to this regulation in ordering a hearing and a decision upon the advice of the Solicitor that a question of fraud or gross irregularity was involved. (Memorandum of the Solicitor, 72 I.D. 157 (1965)). There is, therefore, regulatory provision for the action here taken.

The question then is whether administrative proceedings of the Department of the Interior involving public lands are, as a matter of law, subject to estoppel and

res judicata so as to preclude modification or reversal by the Secretary of a final decision of the Director. The doctrines of estoppel and *res judicata* are not universally applicable to administrative agencies. In *National Rifle Association of America v. Young et al.*, 134 F. 2d 524 (CA DC 1943), the Court stated that the question presented to the Court was whether the District Unemployment Compensation Board, after a hearing on a claim for tax exemption and a ruling that the appellant was entitled to an exemption, was thereafter precluded from changing its decision on the ground of estoppel and *res judicata*.

> Though the doctrine of res judicata has been applied to administrative action of some sorts, it is clear that this judicial doctrine is not to be imported into all administrative proceedings. Administrative agencies are not bound by "the conventional judicial modes for adjusting conflicting claims," and "an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."[5]
>
> The Superior Court was dealing in the case quoted with an administrative error which had been corrected by the court, but the principle is broader than the instance. What errors administrative agencies themselves may correct depends ultimately upon the balance of conflicting considerations. It is always desirable that controversies be settled quickly and finally, but it is also desirable that they be settled correctly. [p. 526].

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[5] *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134, 142, 145 (1940), 60 S. Ct. 437, 84 L. Ed. 656.

The authority of the Secretary to modify or change previous decisions has long been recognized by the courts. In an early case, *Knight v. U.S. Land Association*, 142 U.S. 161 (1891), a decision had been made by the Commissioner of the General Land Office from which no appeal had been taken. The Secretary of the Interior nevertheless sent for the case and after review reversed the Commissioner. The Supreme Court, answering an argument that the Secretary had no authority to so act, stated (at p. 181):

> It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.

This same principle was reaffirmed in a later decision by the Supreme Court in *West v. Standard Oil Company*, 278 U.S. 200 (1929). This was an action brought by Standard Oil to enjoin the continuation of administrative proceedings in the local land office. The question involved was whether a particular area in California was known to be mineral in character in 1903, the date of approval of a survey by the Department. If the

land was not then known to be mineral in character, title to the land passed to the State of California under an act of Congress and through California to Standard Oil. The Department of the Interior had initiated an administrative proceeding to determine the question in 1921. The Secretary of the Interior ordered the proceedings dismissed. A successor Secretary had reinstated the proceedings and had been enjoined from proceeding by the lower Court. In reversing the decision below, Justice Brandeis stated for the Court (at p. 210):

> If at the time of Secretary Work's order the Department still had jurisdiction of the land, he possessed the power to review the action of his predecessor and to deal with the matter as freely as he could have done if the dismissal of the proceedings had been his own act or that of a subordinate official. For, so long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision. *New Orelans v. Paine,* 147 U.S. 261, 37 L. ed. 162, 13 Sup. Ct. Rep. 303; *Beley v. Naphtaly,* 169 U.S. 353, 364, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354; *Lane v. Darlington,* 249 U.S. 331, 63 L. ed. 629, 39 Sup. Ct. Rep. 299; *Parcher v. Gillen,* 26 Land Dec. 34; *Aspen Consol. Min. Co. v. Williams,* 27 Land Dec. 1. Compare *Louisiana v. Garfield,* 211 U.S. 70, 75, 53 L. ed. 92, 96, 29 Sup. Ct. Rep. 31.

Other cases to the same effect were cited in *State of Wisconsin et al.,* 61 I.D. 265 (1958).

As the Court stated in *West v. Standard Oil Company, supra,* the Secretary may reconsider and revise

decisions so long as he retains jurisdiction of the land. The Secretary may not reconsider a matter previously decided when title or a right in the land has vested in a claimant under the public land laws either as a result of the issuance of patent (*Iron Silver Min. Co. v. Campbell*, 135 U.S. 286 (1890)), by operation of law (*West v. Standard Oil Company, supra*), or by grant of a license, easement, or right-of-way (*Chapman v. El Paso Natural Gas Company*, 204 F.2d 46) (C.A. D.C. 1953)):

In *Chapman v. El Paso Natural Gas Company, supra*, the Court denied the Secretary the right to reopen the proceeding for the purpose of imposing additional requirements on the gas company after granting a license to construct a pipeline across public land. However, the Court concluded by saying (at p. 53):

> It may well be appropriate for a licensing authority to reopen proceedings of this kind after final determination has been made in order to correct clerical errors or to modify rulings on the basis of newly discovered or supervening facts, but a decision may not be repudiated for the sole purpose of applying some quirk or change in administrative policy, particularly where, as here, considerable funds have been expended in justifiable reliance upon the earlier ruling. * * *

The Court here recognized the Secretary's general authority to reopen proceedings, but refused to condone a reopening "for the sole purpose of applying some quirk or change in administrative policy" after a license or authorization had been granted.

The cases cited by the contestees do not hold otherwise. Those cases involved either a denial by the Courts

of authority to the Secretary to reconsider a decision after a right in land has vested in a claimant or the application of the doctrine of *res judicata* by the Department in administrative cases in which issues had been previously determined by a final administrative decision. None of the cited cases involve questions of fraud or gross irregularity. Furthermore, refusal by the Secretary to reconsider, at the request of litigious applicants, issues which have gone to final administrative decision does not provide a basis for concluding that the Secretary lacks authority to reopen or reconsider cases on his own initiative.

Even after rights in public lands have vested in third parties, the Government is not precluded from challenging and having the Secretary's actions rescinded if fraud or even a mistake is involved. (*United States v. Southern Pacific Company*, 251 U.S. 1 (1919); *Causey v. United States*, 240 U.S. 399 (1916); *Booth-Kelly Lumber Co. v. United States*, 237 U.S. 481 (1915); *Krueger v. United States*, 246 U.S. 69 (1918); *Germania Iron Co. v. United States*, 165 U.S. 379 (1897).) If the Secretary has lost administrative jurisdiction, he is required to pursue a remedy in the Federal Court. Except for those entrymen to whom patent has been issued, legal title has not vested and the Secretary has not lost administrative jurisdiction.

The contestees assert a denial of due process. The question of due process was considered in *Orchard v. Alexander*, 157 U.S. 372 (1895). In that case the rule was stated (at p. 383):

> Of course, this power of reviewing and setting aside the action of the local land officers is as was decided in *Cornelius v. Kessel*, 128 U.S. 456, not arbitrary and unlimited. It does not prevent

> judicial inquiry. *Johnson v. Towsley*, 13 Wall. 72. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed * * *. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.

In the present case, the contestees have been given notice and have participated in a hearing as required by the *Orchard* decision.

The contestees make the further contention that the Secretary is bound by the stipulation entered into in the prior proceeding. If the Secretary has authority to act *sua sponte*, he cannot be divested of this power by the acts of a subordinate. "The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." (*Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917).) To hold otherwise would lead to an absurd result. The Secretary would be required to issue a patent when, convinced on the basis of the record before him, such action was improper, and then move to have the patent invalidated by the Federal Court. As was stated in *Knight v. United Land Association, supra* (at p. 178):

> * * * For example, if, when a patent is about to issue, the Secretary should discover a fatal de-

fect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annuled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter.

Final Conclusion

Title 43 U.S.C. sec. 329 provides that "claims or entries * * * shall be subject to contest * * * for * * * failure to comply with the requirements of law and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States." Since, in this case, there has been a failure to comply with the requirements of law, the entries must be canceled.

Dent D. Dalby,
Chief Hearing Examiner.

APPENDIX C.

Preliminary Decision of the United States District Court Dated March 13, 1970.

In the United States District Court for the District of Idaho, Southern Division.

Wallace Reed, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants. Civil No. 1-65-86.

United States, Plaintiff, vs. Hood Corporation, et al., Defendants. Civil No. 1-67-97.

Filed at 5 P.M. March 13, 1970.

PRELIMINARY DECISION

This matter, comprised of the two captioned actions consolidated for trial, stand submitted for final determination. As indicated by the court at the close of post trial arguments, the court proposes to enter this Preliminary Decision to be used as a guide to counsel in furnishing proposed Findings of Fact and Conclusions of Law. Formal Findings, Conclusions and Judgment will then be entered and will constitute the final decision of the court.

For the purposes of this short Preliminary Decision, I will treat the matter of the five patented claims first and deal with the unpatented entries thereafter.

PATENTED CLAIMS

There is agreement that the patents issued to five defendant entrymen (Wallace Reed, Myrtle Reed, Joseph L. Nielsen, Robert R. Schwarze and George Crapo) are presumed valid and that the Government, to succeed, must establish by clear and convincing evidence the presence of fraud in the procurement of the patents.

As seen by the plaintiff, the basis of fraud lies in a purported scheme entered into by the defendant Hood Corporation and the entrymen wherein the claims were abandoned or turned over to Hood with the secret understanding that Hood would pay $10.00 per acre to the entrymen when patent was secured in the name of the respective entrymen. The plaintiff sees the mortgage security instruments executed by the parties as a sham and a device to carry out the alleged wrongful scheme.

The proof fails to bear out the plaintiff's contentions. The entrymen originally filed on the claims in good faith. No assignment or other transfer of the entries were made. The mortgage arrangement was legal and proper. No agreement to sell upon receipt of patent is proved. The claims were properly proved up and the entrymen became, at the time of issuance of the patents, the owners with perfectly legal mortgage and water financing obligations outstanding against each interest. Each entry was capable of being separately farmed. The fact that Hood wanted the land, and offered before patent to purchase it, did not constitute grounds to invalidate the entries.

Defendant patentees are entitled to judgment dismissing the fraud aspect of the plaintiff's complaint.

UNPATENTED ENTRIES

This aspect of the instant case engenders the most troublesome issues to be resolved. The court is reviewing the acts and decisions of the Secretary of Interior in administering the desert entry laws. Such review is limited in scope as is recognized by all parties.

The factual background disclosed by the administrative record and the evidence adduced reveals the most

unusual course of action by the administrative agency. A formal contest was filed by the Land Office and the same specific charges presented there as are now raised. By stipulation, properly entered into by counsel for the parties, the issues were presented through an agreed state of facts and documentary evidence. No question has been herein raised as to the authority or propriety of the Government counsel to so stipulate and bind the Government. A final decision was entered which was the decision of the Secretary of Interior. It is stipulated by the Government that it was the Secretary's determination, even though the examiner ignored this fact. The decision found in favor of the contestees on each of the issues involved. That this decision was a final administrative order cannot be doubted. The entrymen, in reliance thereon, justifiably expended substantial money and effort on the entries. Eight months later the Secretary purported to set aside the final decision of his agency. At this time the only remaining step necessary to the issuance of patent to the entrymen were the ministerial acts of execution and delivery. The Secretary ordered a new hearing on the identical charges originally initiated by the Land Office and adjudicated in the stipulated proceedings. Thereafter, a hearings examiner heard lengthy evidence, and took documentary proof. He proceeded to arrive at exactly the opposite legal conclusions on an almost identical set of facts to those originally arrived at by the Secretary. It is interesting to note that he also arrived at the identical conclusions that the solicitor of the department had entered into the record.

The Secretary thereupon adopted the findings and conclusions of the hearings examiner and found against the entrymen on each of the grounds on which he had favored the entrymen in his first decision.

This action of the Secretary in setting aside his decision appears to be contrary to the salutory doctrine of finality of administrative proceedings. No regulation or statute has been cited authorizing the Secretary's action. While res judicata and collateral estoppel are not usually applicable to administrative proceedings, due process is a requirement in cases such as this.

I conclude that the Secretary erred in setting aside his prior decision in that by so doing he acted arbitrarily and contrary to law. The effect of his action was to deny the contestees due process of law.

In the event it should be held that the court is in error in holding that the Secretary wrongfully set aside his original decision, I mean to proceed to review the subsequent order of the Secretary on which the Government presently relies and to rule on the issues therein raised.

The court has previously held that the Secretary was in error as a matter of law in concluding: (1) that the entrymen, having the requisite good faith intention to reclaim the land for their own use at the time of the initiation of the application, had to maintain that intention up to the time of patent; (2) that each entryman must personally expend the $3.00 per acre required by statute. These holdings are reiterated.

After examining all of the evidence presented to the Secretary it is further evident that the Secretary erred as a matter of law in determining the legal effect of the security transactions between the entrymen and Hood Corporation. He erred in holding that the same constituted illegal assignments of the desert entries. The instruments constitute a legal and proper financing

plan for the joint development of the entries. It follows that no assignment was made to a corporation and that Hood Corporation did not hold more than the 320 acres of land provided in the desert entry law.

There is no substantial evidence in the record to support a finding of fraud. The Secretary's decision that the entrymen were not qualified for patent is contrary to law and it must be reversed.

Since only the ministerial acts of issuance and delivery of the patents remains to be accomplished, and since the entrymen are entitled to patent as a matter of law, the Secretary should be ordered by way of mandate to issue the patents to the seven entrymen presently being denied patent.

SUMMARY

For emphasis, the foregoing is intended only to reflect the tentative holdings of the court. Formal and comprehensive Findings of Fact and Conclusions of Law will be entered in due course. The court will retain jurisdiction to determine such collateral issues as thereafter remain for settlement.

Counsel for defendants will prepare, lodge and serve proposed complete Findings of Fact and Conclusions of Law consonant with the indicated holdings hereof. A form of partial judgment also will be lodged and served.

Ray McNichols
United States District Judge

APPENDIX D.

Findings of Fact and Conclusions of Law of the United States District Court.

In the United States District Court for the District of Idaho.

Wallace Reed, et al., Plaintiffs, vs. Stuart Udall, et al., Defendants. Civil No. 1-65-86.

United States of America, Plaintiff, vs. Hood Corporation, et al., Defendants. Civil No. 1-67-97.

Filed at 4 P.M., July 10, 1970.

The above entitled actions consolidated for all purposes, came on regularly for trial, the Court sitting without a jury.

Oral and documentary evidence was introduced on behalf of all of the parties in support of the allegations of their respective pleadings, post-trial briefs were filed and the matter was fully argued; the Court having considered the evidence, the post-trial briefs and the arguments, and being fully advised in the premises, and the Court having made and caused to be filed its Preliminary Decision in the consolidated cases, now makes the following Findings of Fact and Conclusions of Law:[1]

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[1](For the purposes of these Findings and Conclusions the term "entrymen" is defined to include—except where the sense clearly indicates otherwise—the following individuals: Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, George L. Crapo, Raymond T. Michener, Marjorie K. Michener, Charles E. Barnes, Norma E. Barnes, Blaine L. Garn, Ollie Mae Shearman, and the Estate of Charles R. Shearman. The persons who received patents, i.e., Wallace Reed, Joseph L. Nielsen, Robert R. Schwarze, Myrtle M. Reed, and George L. Crapo, are sometimes herein referred to collectively as "patentees".)

FINDINGS OF FACT

I.

In 1961, RAYMOND T. MICHENER, by Application No. 012234, filed application to enter desert lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, legally described as follows:

SE ¼, S ½ NE ¼, Sec. 5, N ½
NE ¼ Sec. 8, T. 6S, R. 8E., B.M.

The submission of final proof for the issuance of patent thereon was filed on November 25, 1964.

II.

In 1961, MARJORIE K. MICHENER, by Application No. 012241, filed application to enter desert lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, legally described as follows:

SW ¼, SW ¼ SE ¼, Sec. 4, T. 6 S, R. 8E., B.M.

The submission of final proof for the issuance of patent thereon was filed on November 25, 1966.

III.

In 1961, NORMA E. BARNES, by Application No. 012342, filed application to enter desert lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, legally described as follows:

SE ¼, E ½ SW ¼ Sec. 7; W ½ SW ¼ Sec. 8,
T. 6 S., R. 8 E., B.M.

The submission of final proof for the issuance of patent thereon was filed on November 25, 1964.

IV.

In 1961, CHARLES E. BARNES, by Application No. 012343, filed application to enter desert lands

located on the Indian Hill Plateau in Owyhee County, State of Idaho, legally described as follows:

SE ¼, E ½ SW ¼ Sec. 8, N ½ NW ¼ Sec. 17, T. 6 S., R. 8 E., B.M.

The submission of final proof for the issuance of patent thereon was filed on November 25, 1964.

V.

In 1961, BLAINE L. GARN, by Application No. 012349, filed application to enter desert lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, legally described as follows:

NE ¼, N ½ SE ¼, SE ¼ NW ¼ and NE ¼ SW ¼, Sec. 17, T. 6 S., R. 8 E., B.M.

The submission of final proof for the issuance of patent thereon was filed on November 25, 1964.

VI.

In 1963, by Application No. 013911, OLLIE MAE SHEARMAN applied for entry on lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, legally described as follows:

W ½ Sec. 5, T. 6 S., R. 8 E., B.M.

The submission of final proof for the issuance of patent thereon was filed on January 12, 1965.

VII.

In 1963, by Application No. 013912, CHARLES R. SHEARMAN applied for entry on lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, legally described as follows:

S ½ NE ¼ Sec. 7; NW ¼, S ½ N E¼ Sec. 8, T. 6 S., R. 8 E., B.M.

CHARLES R. SHEARMAN died on April 27, 1964, and his widow, OLLIE MAE SHEARMAN, was thereafter appointed as Executrix of his estate. Acting in her capacity as Executrix, OLLIE MAE SHEARMAN submitted final proof for issuance of patent on said entry on January 12, 1965.

VIII.

In 1961, by Application No. 012235, WALLACE REED applied for entry on lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, the legal description of which is as follows:

N ½ Sec. 9, T. 6 S., R. 8 E., B.M.

Final proof for the issuance of patent thereon was submitted on September 26, 1963 and patent was issued on September 3, 1964.

IX.

In 1961, by Application No. 012242, JOSEPH NIELSEN applied for entry on lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, the legal description of which is as follows:

S ½ Sec. 9, T. 6 S., R. 8 E., B.M.

Final proof for the issuance of patent thereon was submitted on September 26, 1963 and patent was issued on September 3, 1964.

X.

In 1961, by Application No. 012243, ROBERT R. SCHWARZE applied for entry on lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, the legal description of which is as follows:

S ½ S ½ Sec. 10; N ½ NW ¼, W ½ NE ¼ Sec. 15, T. 6 S., R. 8 E., B.M.

Final proof for the issuance of patent thereon was submitted on September 26, 1963 and patent was issued on September 3, 1964.

XI.

In 1961, by Application No. 012244, MYRTLE M. REED applied for entry on lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, the legal description of which is as follows:

SW ¼ NE ¼, S ½ NW ¼, N ½ S ½ Sec. 10, T. 6 S., R. 8 E., B.M.

Final proof for the issuance of patent thereon was submitted on September 26, 1963 and patent was issued on September 3, 1964.

XII.

In 1961, by Application No. 012299, GEORGE L. CRAPO applied for entry on lands located on the Indian Hill Plateau in Owyhee County, State of Idaho, the legal description of which is as follows:

SW ¼, S ½ NW ¼ & N ½ SE ¼ Sec. 15, T. 6 S., R. 8 E., B.M.

Final proof for the issuance of patent thereon was submitted on September 26, 1963 and patent was issued on September 3, 1964.

XIII.

On or about March 7, 1961, the Indian Hill Irrigation Company, a corporation, was formed to further the effort of obtaining irrigation facilities and the water necessary to irrigate the desert entries.

XIV.

After numerous unsuccessful attempts to obtain financing for the development of the entries, the entry-

men were able to make arrangements with Hood Corporation to provide interim financing to enable them to commence the development of the project. Initial contact with Hood Corporation occurred through Charles Shearman, an officer and major stockholder of Hood Corporation, on February 15, 1963. Hood Corporation installed gas lines for the Intermountain Gas Company in Idaho and therefore was interested in establishing the feasibility of using natural gas engines for pumping water in high lift irrigation projects.

XV.

By July of 1963, Hood Corporation had expended a sum in excess of $250,000.00 in the furnishing and construction of irrigation facilities. The Nordberg engines acquired to operate the pumps were not functioning properly, the lessees farming the lands were under-financed, and the project was in bad condition.

XVI.

Hoodco Farms, an Idaho corporation, was incorporated on or about August 5, 1963, and subsequently, on or about August 15, 1963, Hoodco Farms, Inc., entered into agreements with the entrymen to develop the lands as necessary to obtain patents. Under these agreements Hoodco Farms, Inc., agreed to perform the necessary development work on the individual entries to make them eligible for patent for the sum of $200.00 per developed acre. At the same time, each entryman entered into agreements with the Indian Hill Irrigation Company whereby the irrigation company was to construct the necessary joint irrigation works for the price of $100.00 per developed acre. The latter agreement, though entered into August 15, 1963, at the same time as the agreement that was entered into with Hoodco

Farms, Inc., was dated as of February 19, 1963, and superseded and took the place of all previous contracts for the development of the project. Pursuant to the agreement with Hoodco Farms, Inc., Hoodco Farms, Inc., was given the right to farm the land until the construction costs were fully paid with the proviso that so long as Hoodco Farms, Inc. farmed the land, an amount equal to one-twentieth of the cost of developing the land would be annually credited against this debt. Also the payments owed by the entrymen to Indian Hill Irrigation Company under the agreement dated as of February 19, 1963, were to be paid. The payment of the aforesaid sum to Hoodco Farms and Indian Hill Irrigation Company was secured by promissory notes and mortgages executed by the entrymen which provided that there would be no recourse against the individual entryman for any deficiency in the event of a foreclosure of the mortgage. Under the terms of these agreements, the individual entryman could prepay the balance owing at any time and upon such payment take over the full operation and control of his entry. The irrigation system was so designed that each entry could be separately irrigated. Pursuant to these documents the entrymen were able to obtain the necessary financing to develop the land and were able to lease the land for a cash rental to meet the payments as they came due to Hoodco Farms, Inc. and the Indian Hill Irrigation Company. This financing arrangement also made it possible for Hoodco Farms, Inc. and Hood Corporation to recoup the monies expended and to be expended in the development of the lands and furthered the desire of Hood Corporation to use the project to demonstrate the feasibility of using gas engines on irrigation projects.

XVII.

The aforementioned agreements between the entrymen and Hoodco Farms and Indian Hill Irrigation Company were made at arm's length and in good faith to finance the joint development of the entries.

XVIII.

Although the development of the entire project was made on a joint and cooperative basis, each of the entries was capable of being separately farmed and irrigated.

XIX.

The aforementioned agreements entered into by and between the entrymen and Indian Hill Irrigation Company and Hoodco Farms, Inc., constituted a legal and proper financing plan for the development of the entries and were not a sham devised to carry out any wrongful scheme.

XX.

Prior to the issuance of patents, no contract was made by any of the entrymen for the sale of any of the entries involved.

XXI.

All acts done by the entrymen, or any of them, in the steps taken to acquire patents to their respective entries were done in good faith, and the final proof documents submitted were proper and complete and disclosed all information required by law. All requirements of the Desert Land Laws were met including, without limitation, water supply, cultivation, adequacy of irrigation systems, and expenditures. The development of the lands was essentially as shown on the final proofs and was sufficient to entitle each of the entrymen to a patent upon the submission of final proof.

XXII.

On July 2, 1964, a contest was filed with the Department of Interior seeking to cancel the entries as having been obtained and held in violation of the Desert Land Act. The grounds for said contest were that the parties did not have the requisite intent, that the parties had not made the necessary expenditures in the development and reclamation of their entries, that the arrangements between the entrymen and Hoodco Farms constituted assignments of the entries to a prohibited assignee, and that the arrangements with Hoodco Farms, Inc. resulted in the corporation holding more than 320 acres of desert land.

XXIII.

By stipulation, properly entered into by counsel for the parties (except Ollie Mae Shearman and the estate of Charles Shearman, deceased), the matter as to all entrymen except Ollie Mae Shearman and the estate of Charles Shearman was presented through an agreed statement of facts and documentary evidence. No question is raised in the instant proceedings as to the authority or propriety of the government counsel to enter into such a stipulation and bind the government. One of the documents included in the record was a proposed supplemental agreement between the entrymen (except Ollie Mae Shearman and the estate of Charles Shearman) and Hoodco Farms which the entrymen and Hoodco Farms agreed to enter into if necessary to clarify the provisions of the other agreements in effect at that time. The said entrymen further offered to consider any other modifications of existing agreements that might be proposed by the contestant.

XXIV.

On August 14, 1964, the Director of the Bureau of Land Management acting for the Secretary issued a decision favorable to the entrymen as to all issues without requiring or suggesting any modifications in the contractual arrangements then in existence. The stipulation between the parties had provided that the decision would be rendered by the Secretary of the Interior. This decision was publicly applauded in a news release by the Secretary. It is not disputed but that the decision constituted a decision by the Secretary, though actually made by the Director. This decision was a final administrative order.

XXV.

Thereafter, on September 4, 1964, the contests then pending against the entries of Ollie Mae Shearman and the estate of Charles Shearman, deceased, were also dismissed based on the decision of August 14, 1964. No appeal was taken from the decision of August 14, 1964, nor from the order of September 4, 1964, dismissing the contests against the Shearman entries.

XXVI.

Pursuant to said decision, patents were issued to Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze, and George L. Crapo on September 3, 1964. In reliance upon said decision, Hoodco Farms, Inc., Indian Hill Irrigation Company, and the remaining entrymen pursuant to the aforementioned contracts with Hoodco Farms, Inc. and Indian Hill Irrigation Company continued to develop the entries, expended substantial sums of money, and these entrymen and patentees otherwise justifiably acted in reliance on said decision.

XXVII.

On April 5, 1965, the solicitor of the Department of Interior in a most unusual and unprecedented action issued an opinion which recited that it was unsound policy to dismiss the contest on the basis of the stipulated record, and further recited that even if the facts disclosed in the stipulated record were true, the Director's decision was incorrect on the law. This opinion was transmitted to the Secretary of Interior without notice to the entrymen. Thereafter the Secretary of Interior issued an order directing that the decision of August 14, 1964, be set aside, and that proceedings be instituted.

XXVIII.

On April 22, 1965, complaints were again issued against Ollie Mae Shearman and the estate of Charles Shearman, deceased.

XXIX.

On June 17, 1965, the complaints originally filed on July 2, 1964, against the other entrymen; namely, Raymond T. Michener, Marjorie K. Michener, Norma Barnes, Charles E. Barnes and Blaine L. Garn were amended and a notice was issued to the patentees directing them to appear and present evidence with respect to the charges that their patents had been obtained by fraudulent means.

XXX.

The new complaints against the Shearman entries as well as the amended complaints against the other entrymen embodied essentially identical charges to those that had been made in the 1964 contest proceedings.

XXXI.

Pursuant to the amended complaints, lengthy hearings were held before a hearing officer of the Depart-

ment of the Interior in 1965. The hearing examiner proceeded to arrive at opposite legal conclusions on an almost identical set of facts as those originally arrived at in the decision of August 14, 1964, and ultimately the Secretary of the Interior rendered a decision purporting to cancel the seven unpatented entries and directing that proceedings be taken to cancel the patents theretofore issued on the grounds that they had been fraudulently obtained.

XXXII.

There is no established procedure published either by the Department of the Interior or within the federal statutes or rules, upon the authority of which the Secretary of the Interior had the power to set aside the decision of August 14, 1964, or to conduct further proceedings such as those pursued herein.

XXXIII.

The action of the Secretary of the Interior in setting aside the decision of August 14, 1964, and all actions thereafter leading up to the decision of December 30, 1966, together with that decision, were arbitrary, capricious, and constituted an abuse of discretion and denial of due process of law.

XXXIV.

The rights of the entrymen in their respective entries constituted valuable property rights.

XXXV.

Each of the entrymen had the intention to reclaim the land for his own use and benefit at the time of the filing of his application for entry and at all times maintained the intent required by law.

XXXVI.

The contractual arrangements between Hoodco Farms, Inc., the entrymen and Indian Hill Irrigation Company, did not constitute assignments of the desert entries to Hoodco Farms, but rather constituted a legal and proper financing plan for the joint development of the entries.

XXXVII.

In accordance with the terms of said contractual arrangements, Hoodco Farms became a mortgagee in possession of the lands and did not hold said lands in the capacity of an entryman.

XXXVIII.

At the time that the Secretary purported to set aside the September 14, 1964 decision of his agency, the only step remaining to the issuance of patents of the entrymen were the ministerial acts of execution and delivery of patents.

XXXIX.

On January 19, 1965, George L. Crapo and Melba O. Crapo, his wife, granted unto Virginia Agricultural Products, a corporation, an option to purchase the South half of the Northwest Quarter, the Southwest Quarter, and the North half of the Southeast Quarter of Section 15, Township 6 South, Range 8 East, Boise Meridian, being the lands included in Entry No. 012299. A warranty deed was executed by said optionors on January 19, 1965, for conveyance of said lands to Virginia Agricultural Products and such deed was deposited in escrow on January 22, 1965. The purchase price paid by Virginia Agricultural Products and the warranty deed from George L. Crapo and Melba O. Crapo, his wife, was recorded in the office of the Owyhee County Recorder, September 24, 1969.

XL.

On or about September 3, 1965, George L. Crapo and Melba O. Crapo executed a quitclaim deed to the United States of America covering the lands included in Entry No. 012299 which said deed was recorded in the office of the Owyhee County Recorder on March 22, 1968.

XLI.

Prior to September 3, 1965, officers and agents of the United States Department of the Interior who were involved in the prosecution of this action were informed of the execution and delivery by George L. Crapo and Melba O. Crapo, his wife, of the aforementioned warranty deed conveying the property described therein to Virginia Agricultural Products and were further advised of the aforementioned option granted by said George L. Crapo and Melba O. Crapo to Virginia Agricultural Products.

XLII.

On January 15, 1968, Charles E. Barnes and Vera M. Barnes, husband and wife, executed a quitclaim deed to the United States of America covering the lands included in Entry No. 012343. Said quitclaim deed was recorded on August 14, 1968, in the office of the Owyhee County Recorder.

XLIII.

On January 15, 1968, Norma E. Barnes, executed a quitclaim deed to the United States of America covering the lands included in Entry No. 012342. Said quitclaim deed was recorded on August 14, 1968, in the office of the Owyhee County Recorder.

XLIV.

On January 16, 1968, Blaine L. Garn and Donna Garn, husband and wife, executed a quitclaim deed to the United States of America covering the lands included in Entry No. 012349. Said quitclaim deed was recorded on August 14, 1968, in the office of the Owyhee County Recorder.

XLV.

All of the aforementioned deeds covering the lands described in Entries 012299, 012342, 012343, and 012349 were made subject to all valid existing liens and encumbrances.

XLVI.

All of the mortgages entered into by and between George L. Crapo and Melva O. Crapo; Charles E. Barnes and Vera M. Barnes; Norma E. Barnes; and Blaine L. Garn and Donna Garn with Indian Hill Irrigation Company and Hoodco Farms, Inc. were recorded prior to September 3, 1965.

CONCLUSIONS OF LAW

I.

There was no fraud in the obtaining of patents to the respective entries of Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze, and George L. Crapo and none of said patents should be set aside.

II.

The decision of August 14, 1964, correctly determined the legal issues considered in connection therewith and was a final decision in all respects. It was error for the Secretary of the Interior to purport to set it aside, and his action in purporting to do so was unlawful and of no legal force or effect.

III.

The action of the Secretary of the Interior in setting aside the decision of August 14, 1964, and all actions thereafter leading up to the decision of December 30, 1966, together with that decision were arbitrary, capricious, and constituted an abuse of discretion and a denial of due process of law.

IV.

Even if the act of the Secretary of the Interior in setting aside the decision of August 14, 1964, and in conducting the administrative hearing which resulted in the decision of December 30, 1966, had been legal and proper, said decision was incorrect as a matter of law in the following particulars:

a. Since all of the entrymen had the intention to reclaim their respective entries for their own use at the time of the initiation of the application, it was error for the Secretary to conclude that the parties did not have the requisite intent to comply with the Desert Land Act.

b. Since far more than the requisite $3.00 per acre was spent by or on behalf of each entryman, it was error for the Secretary of the Interior to conclude that the requisite expenditures had not been made. An entryman may seek outside capital to provide for the necessary expenditures in developing the lands of his desert entry.

c. The evidence adduced at the administrative hearing in 1965 did not support a finding that improper assignments had been made to Hoodco Farms, Inc., or the finding that Hoodco Farms, Inc. improperly held more than 320 acres.

V.

The Secretary was in error as a matter of law in determining the legal effect of the security transactions between the entrymen and Hood Corporation and he erred in holding that the same constituted illegal assignments of the desert entries. Rather, these instruments constituted a legal and proper financing plan for the joint development of the entries and therefore no assignment was made to a corporation and Hoodco Farms, Inc. did not hold more than 320 acres of land contrary to the provisions of the Desert Land Law.

VI.

Everything required to be done to entitle the entrymen to obtain patents to their respective entries has been duly and legally performed, and only the ministerial acts of issuance and delivery of the patents remains to be accomplished and consequently the entrymen who have not received patents are entitled to patent as a matter of law, and the Secretary of the Interior should be ordered by way of mandate to issue or cause to be issued the patents to the entrymen presently being denied patents.

VII.

There is no substantial evidence in the record to support a finding of fraud as alleged by the government.

VIII.

Where the right to a patent has become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty.

IX.

Whenever in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that these rights are not disturbed by any action of an executive officer.

X.

The Secretary of the Interior fully exercised and exhausted his discretion when he accepted and approved the rulings of law contained in the decision of August 14, 1964. This decision had the effect of laying down the policy of the Department of the Interior and of establishing the principle that the entrymen were entitled to their patents, and the entrymen were therefore fully justified in regarding the decision as a legally binding determination which was not reversible. It thereafter became proper for this Court to compel the Secretary of the Interior to perform whatever ministerial duties remained to be executed by him pursuant to the initial decision.

XI.

A decision of the Secretary of the Interior may not be repudiated for the purpose of applying some change in administrative policy particularly where, as here, considerable funds have been expended and other action taken in justifiable reliance upon the earlier ruling.

XII.

The fact that Hoodco Farms, Inc. offered before patent to purchase the lands did not constitute grounds to invalidate the entries or set aside the patents.

XIII.

The patents, when issued, shall be subject to the rights of HOODCO FARMS, INC., and INDIAN

HILL IRRIGATION COMPANY under the terms of the agreements and mortgages previously executed by said entrymen.

XIV.

Prior to the 3rd day of September, 1965, GEORGE L. CRAPO and MELBA O. CRAPO had for good and valuable consideration conveyed to VIRGINIA AGRICULTURAL PRODUCTS all of their right, title and interest in and to the lands included in Entry 012299, being the S ½ NW ¼, SW ¼ and N ½ SE ¼ of Section 15, Township 6 South, Range 8 East, Boise Meridian and the United States of America acquired nothing by the quitclaim deed to it from said parties executed September 3, 1965.

XV.

The mortgages made by the respective entrymen to INDIAN HILL IRRIGATION COMPANY and to HOODCO FARMS, INC., are valid and subsisting first and second mortgages on the lands described therein superior to any rights of the United States of America.

XVI.

The United States of America has invoked the jurisdiction of this Court and this Court should retain jurisdiction of these proceedings as may be necessary in order that complete justice may be done including, if necessary, foreclosure of the existing mortgages held by Indian Hill Irrigation Company and Hoodco Farms, Inc., covering the lands included in entries Idaho 012342, 012343 and 012349, and further including any remaining issue of damages.

XVII.

The United States of America is entitled to recover nothing by reason of its complaint.

XVIII.

Each and all of the patentees and their successors and assigns are entitled to retain title to the lands heretofore patented to them free and clear of any adverse claim by the United States of America.

XIX.

Judgment to be entered accordingly.

Ray McNichols
United States District Judge

APPENDIX E.

Judgment of the United States District Court Dated July 10, 1970.

In the United States District Court for the District of Idaho.

Wallace Reed, et al., Plaintiffs, vs. Stuart Udall, et al., Defendants. Civil No. 1-65-86.

United States of America, Plaintiff, vs. Hood Corporation, et al., Defendants. Civil No. 1-67-97.

Filed at 4 P.M., July 10, 1970.

JUDGMENT

The above entitled actions having been consolidated for all purposes, came on regularly for trial before the HONORABLE RAY McNICHOLS, Judge Presiding, the Court sitting without a jury. NELSON H. GRUBE, ESQ., and ARTHUR D. SMITH, ESQ., appeared for the plaintiff in Action No. 1-67-97, and for the defendants in Action No. 1-65-86; PETERSEN, MOSS & OLSEN, by DENNIS M. OLSEN, ESQ. and REED MOSS, ESQ., appeared for WALLACE REED, JOSEPH L. NIELSEN, ROBERT R. SCHWARZE, MYRTLE M. REED, RAYMOND T. MICHENER and MARJORIE K. MICHENER; A. C. KISER, ESQ., appeared for OLLIE MAE SHEARMAN, individually, and in her capacity as Executrix of the ESTATE OF CHARLES SHEARMAN, deceased; KADISON, PFAELZER, WOODARD & QUINN, by ALAN R. WOODARD, ESQ., and A. C. KISER,

ESQ., appeared for HOOD CORPORATION, HOOD-CO FARMS, INC., VIRGINIA AGRICULTURAL PRODUCTS COMPANY and INDIAN HILL IRRIGATION COMPANY.

Oral and documentary evidence was introduced on behalf of all of the parties in support of the allegations of their respective pleadings; post-trial briefs were filed and the matter was fully argued; the Court having considered the evidence, the post-trial briefs, and the arguments, and being fully advised in the premises, and the Court having made and caused to be filed its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED:

I.

That the complaint of the United States of America in Civil Action No. 1-67-97 be dismissed and that the United States of America take nothing by reason thereof.

II.

That the Secretary of the Interior issue or cause to be issued patents to the following named people on the following described lands, said patents and the lands described therein to be free and clear of any claim of the United States of America:

a. RAYMOND T. MICHENER
SE ¼, S ½ NE ¼, Sec. 5; N ½ NE ¼ Sec. 8, T. 6 S., R. 8 E., B.M.

b. MARJORIE K. MICHENER
SW ¼, SW ¼ SE ¼, Sec. 4, T. 6 S., R. 8 E., B.M.

c. NORMA E. BARNES
SE ¼, E ½ SW ¼ Sec. 7; W ½ SW ¼ Sec. 8, T. 6 S., R. 8 E., B.M.

d. CHARLES E. BARNES
SE ¼, E ½ SW ¼ Sec. 8, N. ½ NW ¼ Sec. 17, T. 6 S., R. 8 E., B.M.

e. BLAINE L. GARN
NE ¼, N ½ SE ¼, SE ¼ NW ¼ and NE ¼ SW ¼, Sec. 17, T. 6 S., R. 8 E., B.M.

f. OLLIE MAE SHEARMAN
W ½ Sec. 5, T. 6 S., R. 8 E., B.M.

g. ESTATE OF CHARLES R. SHEARMAN
S ½ NE ¼ Sec. 7; NW ¼, S ½ NE ¼ Sec. 8, T. 6 S., R. 8E., B.M.

III.

That the patents issued to CHARLES E. BARNES, NORMA E. BARNES, and BLAINE L. GARN be delivered to the Clerk of this Court for forwarding to the Owyhee County Recorder for proper recording upon the payment by HOODCO FARMS, INC., and INDIAN HILL IRRIGATION COMPANY of proper recording fees.

IV.

That the Court shall and does hereby retain jurisdiction of the proceedings as necessary in order that complete justice may be done including, without limitation, foreclosure of the existing mortgages on the lands described in the patents to be issued to Blaine L. Garn, Norma E. Barnes and Charles E. Barnes, and further including any remaining issue of damages.

V.

That the patents issued to the following described people on the following described lands and the lands described therein are free and clear from any claim of the United States of America:

a. WALLACE REED
N ½ Sec. 9, T. 6 S., R. 8 E., B.M.

b. JOSEPH L. NIELSEN
S ½ Sec. 9, T. 6 S., R. 8 E., B.M.

c. ROBERT R. SCHWARZE
S ½ S ½ Sec. 10, N ½ NW ¼, W ½ NE ¼ Sec. 15, T. 6 S., R. 8 E., B.M.

d. MYRTLE M. REED
SW ¼ NE ¼, S ½ NW ¼, N ½ S ½ Sec. 10, T. 6 S., R. 8 E., B.M.

e. GEORGE L. CRAPO
S ½ NW ¼, SW ¼, N ½ SE ¼ Sec. 15, T. 6 S., R. 8 E., B.M.

/s/ Ray McNichols
United States District Judge

APPENDIX F.

Decision of the United States Court of Appeals for the Ninth Circuit Dated June 4, 1973.

United States Court of Appeals for the Ninth Circuit.

Wallace Reed, et al., *Appellees,* vs. Rogers C. B. Morton, Secretary of the Interior, et al., *Appellants.* No. 71-1187.

United States of America, *Appellant,* vs. Hood Corporation, et al., *Appellees.* No. 71-1188.

[June 4, 1973]

Appeals from the United States District Court for the District of Idaho

Before: BROWNING, DUNIWAY, and GOODWIN, Circuit Judges.

GOODWIN, Circuit Judge:

The United States appeals from two judgments in related litigation, approving the acquisition and development of 3,700 acres of public land in Idaho.

The first action was brought by Wallace Reed and others to set aside an administrative decision of the Secretary of Interior canceling seven individual entries filed under the Desert Land Act of 1877, *as amended,* 43 U.S.C. §§ 321-339.[1]

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[1]Chapter 9 of Title 43 of the U.S. Code, 43 U.S.C. §§ 321-39, comprises the statutory framework by which individuals may acquire title from the United States to limited tracts of desert lands. Section 322 defines desert lands. Section 321 instructs the Secretary of the Interior to issue patents for up to 320 acres of desert land to a citizen who pays 25 cents per acre and files a declaration of intent to irrigate the land, and pays an additional dollar per acre and makes satisfactory proof of reclamation within three years of filing the declaration of intent. Under section 328 an

(This footnote is continued on next page)

The second action was brought by the government to cancel five patents granted to persons participating with the Reed group in acquiring the public lands in a manner the government contends was in violation of the Desert Land Act.

The district court held in the first action that the Secretary was wrong in canceling the seven entries that had not yet ripened into patents. In the second action it held that the five patents were free from fraud or mistake. We reverse both judgments.

I

The relevant facts apply to both cases. In January and February of 1961, Reed, a farm-equipment dealer, and Raymond Michener, an agricultural engineer, recruited friends and relatives who, with themselves, filed twelve entries upon government land available for entry under the Desert Land Act. Reed and Michener contemporaneously purchased from the State of Idaho a section of state-owned land that was contiguous with parts of the twelve tracts for which desert-land applications had been filed.

On March 7, 1961, Reed and Michener organized a non-profit corporation known as Indian Hill Irrigation Company, and assumed the titles of officers of the corporation. There was no election of officers, shareholders' meeting, or payment for subscribed stock.

When Reed and Michener originally conceived their plan for the 3,700 acres, they had hoped to defray the substantial costs of irrigation and development by a

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entryman must prove he has expended at least $3 per acre for water rights and irrigation and that he has cultivated one-eighth of the land. Section 324 forbids assignment of land "to or for the benefit of any corporation or association."

Bureau of Reclamation Small Projects loan. In the fall of 1962, prospects for the government loan did not appear to be good, and Reed and Michener approached the Travelers Insurance Company for a private loan with which to begin development. Travelers insisted that before it would make the requested loans it would require first mortgages on Reed and Michener's state section and on Reed's ranch, 1,000 acres of the project to be under irrigation, two entries to be processed to the point that they could be patented, and a lessee acceptable to Travelers who would operate the entire project as a farm. Under these conditions, the proposed Travelers loan could not meet the project's need for immediate funds.

Reed and Michener entered into a five-year lease with A. J. Jolley and G. A. Masterson. The lease divided the anticipated farm proceeds among the named parties and gave the lessees an option to buy the land.[2] There was no provision for the other entrymen to receive anything, and there is no evidence that any entryman other than Reed and Michener participated in the lease negotiations.

On February 12, 1963, Reed and Michener called a meeting of the entrymen and informed them that because of a shortage of capital caused by the failure of the anticipated loans to materialize each entryman would either have to pay to Reed and Michener $983 in cash and assume a personal obligation of between $12,000 and $14,000, or sign a long-term lease with

[2]Jolley and Masterson later sublet to others.

and turn over development of the project to Indian Hill Irrigation Company. Six days later, all the entrymen except Reed and Michener entered into a twenty-year "lease and development contract" with Indian Hill, and signed notes and mortgages for $300 per acre payable on demand to secure the payments that would fall due under the lease. These notes were secured only by the mortgages on the entry lands, and were not the personal obligations of the entrymen. Indian Hill agreed to bear all expenses and retain all profits.

There was testimony by two of the entrymen that it was understood at the February meeting that in turning over development of the project to Indian Hill the entrymen were giving up all their rights in the land, but would receive $10 per acre after their entries ripened into patents. The developers deny that any such understanding existed.

Two entrymen elected to drop out of the project in February 1963, and sold their interests for $5.00 an acre to Charles Shearman. Shearman was a part owner of Hood Corporation, a firm that installed gas pipelines to furnish power for irrigation pumps. Hood Corporation was, in early 1963, furnishing goods and services to the project, and Shearman became interested in the project as an investment.

By July of 1963, Hood Corporation had about $250,000 invested in the irrigation equipment in the Indian Hill project, and observed with increasing concern that the project was losing money. The original

developers, Reed and Michener, were also discouraged and wanted to sell out. Shearman, however, was still enthusiastic, but wanted a free hand in developing the land. Shearman, Reed, and Michener met and reached an agreement. The agreement was memorialized in this somewhat cryptic handwritten memorandum, described in the record as G-115:

"4500 Ac. a 50 225,000
Payoffs 25,000
200,000 ..... Total Price
5,000 ..... down
25,000 ..... when agreements signed
30,000 ..... when 1st 1200 Ac. proven
70,000 ..... when 3300 Ac. proven
70,000 ..... when 5 years"

During the summer of 1963 Hood's attorney prepared documents to bring about Shearman's objective of present security for money advanced and eventual acquisition of title to the lands in the project. For this purpose, Shearman formed a subsidiary of Hood, called Hoodco Farms. The attorney also completed the paper work that had been neglected when the Indian Hill corporation had been organized.

By an agreement dated August 15, 1963, superseding the February 18, 1963, agreement with Indian Hill, each entryman gave a nonrecourse promissory note to Hoodco Farms for $200 for each irrigable acre in his entry. Each note was secured by a second mortgage on the maker's entry. First mortgages and similar notes for $100 per acre were given to Indian Hill. Each entryman surrendered possession to Hoodco for a period of twenty years. All stock of Indian Hill was pledged to Hoodco. Hoodco's attorney also prepared

an offer to each entryman, except Reed and Michener, to purchase after patent the entryman's land and his stock in Indian Hill for $10.00 an acre. By a separate agreement, Reed and Michener were to receive $197,200, to be paid as Hoodco obtained title to the project. A separate offer of $2,800 for title was given to Reed's mother. All documents except the $10 per acre offers to the entrymen were presented to the entrymen in packets. The entrymen signed the papers, in most cases without reading them, and received no copies.

Hoodco assumed complete control of the project, and in September 1963 submitted final proofs to the land office. When the land office requested evidence of the entrymen's stock ownership in Indian Hill, Hoodco's attorney prepared stock certificates that purported to be "fully paid and nonassessable," although payments had never been made.

Between August 1963 and August 1964, Hoodco completed the irrigation system and the clearing of the land, at a cost of more than $1,000,000, or some $243 per acre.

On November 14, 1963, Jolley, one of the original lessees, reported to the Land Office that Reed and Michener had agreed with Shearman to sell the patents for $250,000. The following March, Shearman died in an airplane accident, and Virginia Agricultural Co. assumed control of the project.[3]

On July 2, 1964, the State Director of the Bureau of Land Management ordered a contest of the entries on

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[3]After Shearman's death, Shearman's business partner in Hood, Bernard Laulhere, interested Harvey Proctor, an officer of the Southern California Gas Co., in the land development. Proctor formed the Virginia Agricultural Company to take control of the project.

a stipulated record. The record, prepared by attorneys for the entrymen, did not reveal the offers by Hoodco, the memorandum G-115, or the various "understandings" about transfer of the property. The record did include the formal contracts, the stock-pledge agreement, and a concession by Hoodco that the Indian Hill stock was not fully paid. The stipulation also included a proposed "supplemental agreement * * * designed to make it clear that whenever an entryman paid off in cash what he owed, or assumed his proportionate share of the long term financing, he could obtain possession of his entry."

On August 14, 1964, the State Director of the Bureau of Land Management dismissed the contest as to all entries but the Shearmans.

On September 3, 1964, patents were issued to Wallace Reed, Myrtle Reed, Joseph Nielsen, Robert Schwarze, and George Crapo. These patents were delivered to Reed or Michener, recorded at Hoodco's expense, and never returned to the putative patentees.

On September 4, 1964, the Director dismissed the contest as to the entries of the Shearmans. Thereafter the remaining entrymen submitted final proof papers.

On January 19, 1965, each of the patentees executed an option agreement and deed of his entry to Virginia Agricultural. Each option agreement granted Virginia Agricultural the option of purchasing the patentee's land for $10 an acre, subject to the agreements and notes with Indian Hill and Hoodco.

On January 22, 1965, Reed and Michener entered into a new agreement with Hoodco Farms. Hoodco agreed to pay Reed and Michener $17,419.17 for delivery to Virginia Agricultural of $10-per-acre options

on the entries of the five patentees, $24,386.33 for delivery to Virginia Agricultural of $10-per-acre options on entries of the other five original entrymen plus the Shearman entries, $56,000 after obtaining these entries, $29,596.80 for delivery of $10 options on entries known as the Blackwell, Hougen, and Nielsen entries (the July 1963 entrymen), and a bonus of $1,300 for the Hougen and Nielsen entries. The total payment was to be $128,702.30.

On March 9, 1965, the Solicitor of the Department of the Interior, in response to a request for information from the Secretary, advised the Secretary that it was error to decide the Indian Hill contests on a stipulated record and that the long-term lease and security arrangements violated the Desert Land Act. The Secretary set aside the Director's decision as to the seven as yet unpatented entries, and ordered the matter reopened.

On May 25, 1966, the Secretary's chief hearing examiner made findings against the entries. He found a lack of good-faith intent to reclaim at the time of entry and sufficient fraud to vitiate the entries. He found that the contracts and notes with Hoodco were assignments for the benefit of a corporation,[4] that Hoodco held in excess of 320 acres,[5] and that the entrymen had not spent $3.00 an acre.[6] The examiner also found that the system as Hoodco built it could not be farmed in individual units because of the lack of access roads and water-measuring devices, and that conversion to farm-

[4]Such assignments are prohibited by 43 U.S.C. § 324. *See* note 1 *supra.*

[5]The statute allows a maximum of 320 acres to be claimed by an entryman. *See* note 1 *supra;* 43 U.S.C. § 329.

[6]An entryman must expend at least $3 per acre for water rights and irrigation in order to perfect his claim. *See* note 1 *supra.*

ing by individual units would not have been economically feasible.[7] The Secretary of the Interior, as noted, concluded that the examiner was right.

The United States sued to eject the patentees. Hoodco sued to invalidate the Secretary's May 1966 decision canceling the entries. The cases were consolidated for trial, and on July 10, 1970, the district court found in favor of Hoodco on all points in both actions.

II

The detailed findings of fact were prepared by Hoodco, after the district court filed a memorandum finding generally in Hoodco's favor. Despite the great weight to be accorded findings made by a trier of fact upon disputed contentions of fact, we cannot escape the conclusion that the district court here gave undue weight to the substantial investment of Hoodco in developing the lands. The court erroneously estopped the government from asserting valid legal grounds for setting aside the fraudulent transactions by which Hoodco acquired the lands in question.

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[7]The examiner relied on the form of development for two points. First, he saw it as evidence that Hoodco had planned from the beginning to retain possession of the lands. Second, he noted that unitary development created a major obstacle to any entryman's actually repaying Hoodco and regaining his lands.

The parties agree that the entries as developed could not be farmed as units, but they disagree as to whether conversion to small-farm operation was economically feasible. An entryman would have had to pay $96,000 to regain bare possession of a 320-acre entry. He would then have been faced with an irrigation company, Indian Hill, controlled by outsiders, and with the necessity of purchasing or renting from another company, Hoodco, the part of the irrigation system owned by it. The need to perform extensive modifications of the system to permit individual farming would present the ultimate obstacle.

Thus, the examiner concluded that the entryman had neither the ability nor the intent to pursue individual farming operations.

The district court's conclusion that the entrymen had the requisite intent to develop the land at the time patent issued was clearly erroneous. The district court's conclusion that there was no "substantial evidence" of fraud or impropriety in the administrative record is also in error.

The evidence is virtually conclusive that the entrymen abandoned all hope and intent to develop at the time of the February 12, 1963, meeting, and agreed at that meeting to transfer the project to others.

The $10 per acre which some of the entrymen testified that they understood they would receive if they turned over the project to the developers pervades the documentary evidence. The $25,000 in "payoffs" mentioned in G-115 works out to almost exactly $10 per acre for the noncontracting entrymen. The offers prepared by Hoodco's attorney in the summer of 1963 were for $10 per acre. The final agreements signed by the entrymen provided that they would receive $10 per acre for their entries. These agreements were prepared by Hoodco and signed by the entrymen without negotiation or consultation.

Hoodco has not explained its unilateral dealings with the entrymen nor the meaning of the memorandum G-115. The document, by its own terms, purports to memorialize terms of a sale of the land for $200,000 by the developers. Such a secret sale before patent is wholly illegal, and, unless explained, is almost conclusive evidence of a fraud upon the government. *See United States v. Keitel,* 211 U.S. 370 (1908).

However, Hoodco asserts that the $200,000 was to pay for the engineering studies and other services and property the developers had provided. But the develop-

ers' own estimates of the value of these items establish that the $200,000 was an unreasonable and highly improbable payment. Furthermore, Hoodco's theory does not explain the "payoffs" mentioned in the document G-115. Although two of the three parties to the contract and the attorney who helped prepare the document were available to testify, no one offered an alternative explanation.

Moreover, additional evidence that G-115 was a contract for the sale of land is found in the August 1963 offers to the Reeds and to Michener and in the January 22, 1965, agreement of Reed and Michener with Hoodco Farms. The 1963 offers show that $200,000 was to be paid for obtaining title to the land. The sums promised under the 1965 agreement also totaled, with adjustments, $200,000.[8] Although these sums were purportedly for obtaining options to the land after patents issued, options and deeds had been obtained three days earlier from those entrymen holding patents.

---

[8]These payments relate to the G-115 exhibit as follows:

January 22, 1965, payment	$128,702.30
Offers to Reed and Micheners on own patents at $10/acre	11,200.00
Advance to Reed and Michener in October 1964	10,000.00
Crop loss	19,897.70
Loan	1,500.00
Price of Section 16 (from G-415, a handwritten memo of Michener's)	30,000.00
Total	$201,300.00
Less: "Bonus" (from G-415, handwritten memo of Michener)	1,300.00
Amount in G-115	$200,000.00

In addition, the entrymen themselves, after the February 12, 1963, meeting, did not behave as if they had any interest in the land. They signed without discussion or dissent the August 15, 1963, agreements which made it practically impossible for them ever to regain possession of the land. The entrymen received no copies of the documents they had signed, in most cases, without reading. They did not protest when Hoodco developed the land in such a way that it could not be farmed in individual units. The entrymen exhibited no curiosity when, upon issuance, the patents were delivered to and recorded by Hoodco Farms, although the patentees were the ostensible titleholders. At the time of the final "sale" the patentees entered into no meaningful negotiations with the purchasers.

Upon this record, we must conclude that the entrymen understood at the February 12, 1963, meeting that they were transferring their interests to the developers for $10 an acre, and that they did not regard themselves as having any interest in the land after this meeting. Similarly, the developers secretly agreed in the July 1963 meeting to sell the title to the land to Shearman. In this case, as in *Jones v. United States*, 258 U.S. 40, 48 (1922) (Holmes, J.), "it is evident * * * that all hands proceeded on the notion that if the entrymen put in a periodical appearance on the land they would get it, and that no one troubled himself about actual intent provided that the affidavits were in due form * * *."

Hoodco argues nonetheless that it is entitled to the land. Hoodco asserts that the understanding in 1963 between the entrymen and the developers that the entrymen would sell their land for $10 an acre is irrelevant, that the secret contract with Shearman to sell the

land to him is irrelevant, and that the fact that these arrangements were concealed from the Bureau of Land Management is also irrelevant. Such an argument defies reality.

Hoodco relies on a series of cases which held that under the Timber Culture Act, June 14, 1878, ch. 190, 20 Stat. 113, or the Timber and Stone Act, June 3, 1878, ch. 151, 20 Stat. 89, the Land Department could not require an entryman to swear at the time of final proof that he was not acting for another and could not prevent an entryman from making an executory contract to sell his land after patent. *Adams v. Church,* 193 U.S. 510 (1904); *Williamson v. United States,* 207 U.S. 425 (1908); *United States v. Biggs,* 211 U.S. 507 (1909). The rationale of these cases was held to apply to the Desert Land Act of 1877, March 3, 1877, ch. 107, 19 Stat. 377, in *United States v. Mackintosh,* 85 F. 333 (8th Cir. 1898).

However, *Mackintosh* was decided before the enactment of certain amendments to the Desert Land Act and without the benefit of Supreme Court precedent construing the Act. We decline to follow it.

The rationale of the cases holding that the Land Department could not restrict the right of any entryman under the timber acts to make arrangements to dispose of his land prior to patent was that such a restriction constituted a restraint on alienation not contained in the statute. The Desert Land Act of 1877, like the timber acts, contained no restraint on alienation subsequent to entry. However, the Act of March 3, 1891,

ch. 561, § 7, 26 Stat. 1095 (codified as 43 U.S.C. § 329), repealed the timber culture laws and amended the Desert Land Act to provide:

> "* * * [N]o person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands * * *.
>
> "Provided, however, that additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be cancelled * * *." (Emphasis deleted.)

Under the Homestead Act cases referred to in the amendment it was illegal to make a contract to convey an unpatented entry. *E.g., Anderson v. Carkins,* 135 U.S. 483 (1890).

The Land Department construed the 1891 amendment as allowing open assignments of an entry with the assignee completing the proof of the entryman but as permitting the Department to cancel an entry if a secret assignment were made. *Herbert C. Oakley,* 34 Interior Dec. 383 (1906). The rationale of this decision is that the recognition of a right of an entryman to secretly dispose of his land "might easily operate to nullify that provision of the act which declares that 'no person or association of persons shall hold, by *assignment* or *otherwise,* prior to the issuance of patent, more

than three hundred and twenty acres * * *.'" (Emphasis in opinion.) *Id.* at 386. This construction of the Act was approved in *United States v. Hammers*, 221 U.S. 220 (1911), where the Supreme Court, faced with the question of whether assignment was permitted at all under the 1891 amendments, allowed itself to be guided by the then long-standing administrative practice of allowing public assignments to qualified assignees. Congress also approved the administrative construction of the Act when, in the course of adding a provision prohibiting assignments to corporations, it codified the requirement that assignees possess the same qualifications as entrymen. Act of March 28, 1908, ch. 112, 35 Stat. 52 (codified as 43 U.S.C. § 324).

Hoodco, however, submits that the administrative practice of canceling entries when secret assignments are discovered is inapplicable because, unlike the secret assignment in *Oakley*, the arrangement here was not an explicit formal contract, but merely an undisclosed "understanding" between the entryman and the developers that would not have been legally enforceable even if it had not been kept secret.

But secret "arrangements" and "understandings," like more formal contracts to pass title to desert land grants after patent, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty. However quixotic it may seem at this late date to say so, Congress never intended bargain-price desert land to be provided for the benefit of corporations or large landholders.

In the present case there was an understanding that title to the lands would pass after patent, and that

understanding was not revealed by the claimants. Because "the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible," the patents and entries must be canceled. *United States v. Keitel,* 211 U.S. at 395.

III

As to the unpatented lands, Hoodco argues that the administrative hearings and cancellation of the entries were invalid because the Secretary had no power to set aside the 1964 decision of the Bureau of Land Management.[9] Even if this argument were impeccable, however, it would afford Hoodco little solace. Were the Secretary obliged to issue the remaining patents, he would only be duty bound to cancel them, for the same fraud that vitiates the patents already granted infects the unpatented entries. Furthermore, Hoodco's argument is not correct.

Hoodco urges that the setting aside of the 1964 decision violated the Constitution, the Administrative Procedure Act, and the regulations of the Secretary,

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[9]Hoodco urges that the 1964 decision was the decision of the Secretary rather than that of the Bureau of Land Management. We disagree. The purported "concession" by government counsel that the decision was that of the Secretary was merely an argument that it was legally irrelevant who made the decision, a point we need not decide. When asked specifically whether they made much a concession, government counsel stated that they did not and that in fact the director of the BLM had made the erroneous decision.

Nor does the fact that the decision of the BLM was announced in a press release issued through the office of the Secretary render it the decision of the Secretary. A press release like the one issued operates as an announcement of the fact of lower-echelon governmental action, nothing more. *Cf. F.T.C. v. Cinderella Career & Finishing Schools,* 404 F.2d 1308 (D.C. Cir. 1968).

and that the Secretary was estopped from reopening the 1964 decision by Hoodco's detrimental reliance. We reject all of these contentions.

The reopening was justified by 43 C.F.R. § 1843.9 (1965):

> "When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed except for fraud or gross irregularity."[10]

We approve the implicit finding of the Secretary that there was "fraud or gross irregularity" in the original dismissal of the contest on a stipulated record which did not reveal material facts, as well as in the conduct of the patentees and developers.

Nor did the reopening violate the Constitution. Prior to patent the Secretary retains jurisdiction over public lands. *Knight v. United States Land Association,* 142 U.S. 161 (1891). While the Secretary may not impose "conditions and stipulations *ad infinitum," Chapman v. El Paso Natural Gas Co.,* 204 F.2d 46, 52 (D.C. Cir. 1953), he does "have the power, in a proper case, to correct his own errors." *Boesche v. Udall,* 373 U.S 472, 478 (1963).

Hoodco urges that the decision to reopen deprived it of "property" and that therefore the decision to reopen could be made only upon notice and after a hearing. But the decision to reopen deprived Hoodco of no rights in the land. Having made their claims and entered upon the land, the entrymen became vested

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[10]The Secretary's authority to reopen is now expressed in more general terms in 43 C.F.R. § 4.5 (1972).

with equitable title. The abortive initial contest did not increase their entitlement to the legal title that would pass if patent issued. *Cf. Cameron v. United States*, 252 U.S. 450, 459-63 (1920). Nor did the decision to set aside the first contest diminish their rights in the land. These rights could be, and were, taken away only after a hearing directed to the issue of the legality of the entries. The only deprivation suffered was the burden of having to defend again a contest of the entries. This burden is not light, but it was not imposed without a prior hearing. The memorandum of the Solicitor to the Secretary recommending reopening and the decision of the Secretary were given to the claimants prior to the hearing on the merits, and they had an opportunity to argue to the hearing examiner that the case could not be reopened. This was all the hearing to which the claimants were constitutionally entitled. *Cf. Ferry v. Udall*, 336 F.2d 706, 714 (9th Cir. 1964). *cert. denied* 381 U.S. 904 (1965).

Our analysis of the constitutional issue also disposes of Hoodco's contention that section 5 (d) of the Administrative Procedure Act, 5 U.S.C. § 554(d) was violated by the response of the Solicitor's office to the Secretary's request for advice on the propriety of the original decision. Hoodco urges that the memorandum was a private communication with the "judge" in violation of A.P.A. § 5(d). But section 5 applies only to adjudication required by statute or the Constitution to be "determined on the record after opportunity for an agency hearing * * *." A.P.A. § 5(a), 5 U.S.C. § 544(a). Since there was no statutory or constitutional requirement that the Secretary's decision be preceded by a formal hearing, the communication was not unauthorized.

Nor was the government estopped by the first decision. As a general rule the government is not estopped to attack illegality. *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). Hoodco urges that the government should be estopped in this case as an exception to the general rule because the dismissal of the 1964 contest purported to be final and because of Hoodco's heavy expenditures in reliance on the 1964 decision. But Hoodco knew of its own illegal conduct, and should have recognized the risks inherent in its fraud. Given that the Secretary could legally set aside an erroneous decision prior to patent if such conduct came to light, Hoodco's position is no better than that of a litigant who conceals evidence anl then relies on an erroneous lower court decision that is overturned on appeal.

In any event, Hoodco has not made out a sufficient case of detrimental reliance. By the time of the 1964 decision virtually all of the major expenditures on the farm had been completed in reliance on prior arrangements with the entrymen. The only specific expenditures that Hoodco asserts it made in reliance on the 1964 decision were a loan commitment fee, a contract with a manager to run the farm, and ordinary farming expenditures. While Hoodco may not have recouped all of thse expenditures in profit from the land in the years since 1964, the amount allegedly lost in reliance on the 1964 decision is negligible compared to the value of the land.

Both judgments are reversed with instructions to enter judgments for the government.

APPENDIX G.

Order Entered on July 27, 1973 Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Wallace Reed, et al., Appellees, v. Rogers C. B. Morton, Secretary of the Interior, et al., Appellants. No. 71-1187.

United States of America, Appellant, v. Hood Corporation, et al.. Appellees. No. 71-1188.

Filed July 27, 1973.

Appeals from the United States District Court for the District of Idaho.

Before: BROWNING, DUNIWAY, and GOODWIN, Circuit Judges.

ORDER

On petition for rehearing, the panel has voted to deny rehearing and reject the suggestion for rehearing en banc, and to amend its opinion as follows:

> Delete the last sentence of footnote 3, on page 5 of the slip opinion, and substitute therefor the following sentence: "Proctor owned the Virginia Agricultural Company."

The full court has been advised of the proposal to amend the opinion as ordered above, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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No. 73-396

In the Supreme Court of the United States

OCTOBER TERM, 1973

WALLACE REED, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

HOOD CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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WALLACE H. JOHNSON,
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Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-396

WALLACE REED, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

HOOD CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. The question presented in this case is whether the arrangements made between the entrymen-petitioners and a corporation ineligible to acquire land under the Desert Land Act [1] by which entries under the Act were made in the names of the petitioners, but all control of the project was vested in the ineligible corpora-

[1] 19 Stat. 377, as amended, 43 U.S.C. 321, *et seq.*

525-283—73——1

tion, with secret agreements by which petitioners undertook to transfer title to the corporation after the issuance of patents, justified the Secretary of the Interior in cancelling the entries administratively and seeking judicial cancellation of the patents issued to the petitioners.

In 1960, Wallace Reed and Raymond T. Michener, along with 10 friends and relatives whom they had recruited, filed 12 entries for the acquisition of public land under the Desert Land Act covering about 3,700 acres of public land in Idaho (Pet. App. 137–138)[2]. The Desert Land Act, enacted in 1877 with significant amendments in 1891 and 1908 (see note 5, *infra*), seeks to facilitate reclamation of arid and semi-arid public lands in the West through individual effort. Accordingly, the Act (1) limits entry to individuals and limits each individual to 320 acres, 43 U.S.C. 321; (2) requires that the individual or his (lawful) assigns make certain minimum expenditures in reclaiming the land and file various progress reports, 43 U.S.C. 328; and (3) specifically bars assignments of entries to or for the benefit of any association or corporation, 43 U.S.C. 324.

Pending final proofs on seven of the 12 entries at issue here, the Secretary of the Interior, upon the advice of the Department's Solicitor, reopened an inquiry that had approved the entries to see whether the seven en-

[2] Petitioner has filed an appendix bound with the petition that contains the text of various statutes and regulations and a separately bound appendix containing the decisions below—"Pet. App." references are to the latter.

tries and five patents that had already been issued were based on fraud and misrepresentation and should be cancelled. In a detailed opinion the Secretary determined that they were. *United States* v. *Ollie Mae Shearman,* 73 I.D. 391 (Pet. App. 18). Briefly, the Secretary's investigation revealed that by a complicated series of paper transaction, including mortgages, non-recourse notes and long-term leases, Hoodco Farms, Inc.—a corporation—had acquired complete dominion over the entries, had received the right to all profits in exchange for nominal rent, and had secretly arranged to purchase the patents at a minimal price as soon as they would be issued. In effect, the entrymen had abandoned any good faith intention to reclaim for their own benefit and had agreed to act as strawmen for a corporation ineligible to acquire public land under the Act.

The Secretary specifically found that prior to the dates their entries were allowed each of the entrymen and patentees had assigned his entries to Hoodco Farms, Inc., that prior to the issuance of the patents Hoodco had assignments to and control over a total area of 3,688.6 acres (in violation of both the acreage limitation and corporate prohibition of the Act), that the entrymen had not personally expended the funds required by the Act for reclamation, and that the entrymen and patentees had engaged in fraud, deceit, concealment of fact, and misrepresentation of fact in acquiring their entries and patents (Pet. App. 23).

Based upon this determination, the Secretary ordered administrative cancellation of the entries of the seven remaining entrymen and sought judicial

cancellation of the five entries that had gone to patent.[3]

Thereafter, petitioners sued the Secretary to set aside his administrative decision cancelling the entries and patents, and the United States sued to evict the purchaser of the patented land. These actions were consolidated, and the district court set aside the determination of the Secretary that the entries and patents had been unlawfully obtained (Pet. App. 107–131). On appeal, a unanimous panel of the court of appeals reversed (Pet. App. 136–154).[4]

2. The opinion of the court of appeals fully and clearly sets out the facts concerning these transactions, the applicable provisions of the Desert Land Act, and the controlling decisions. We rely essentially on that opinion and add only the following.

a. Congress enacted the Desert Land Act as a subsidy to *individual small farmers* who would undertake to reclaim and farm desert land in tracts not exceeding 320 acres. As the court of appeals noted, "Congress never intended bargain-price desert land to be provided for the benefit of corporations or large

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[3] Before any patents were issued, Hoodco Farms sold its interest in the project to Virginia Agricultural Company, a company organized for that purpose, and after the five patents were issued they were sold by the entrymen to Virginia as previously arranged with Hoodco (Pet. App. 141–143, 155). There was thus no reliance on public records or *bona fides* in the purchaser of the patented land that arguably might estop the government from cancelling these patents. See Pet. App. 151–152.

[4] A petition for rehearing was denied, with the order specifying that no judge of the court of appeals requested a vote on the suggestion for a rehearing *en banc* (Pet. App. 155).

landholders" (Pet. App. 150). If entries and patents such as those obtained in this case were permitted, it would be an open invitation to corporations to obtain large tracts of public land at subsidized prices contrary to provisions of the Act designed specifically to prevent such abuses of the congressional intent.[5]

b. Petitioners' reliance on the Eighth Circuit's 1898 decision in *United States* v. *Mackintosh*, 85 Fed. 333, to posit a conflict among circuits, is misplaced. *Mackintosh* was a suit to cancel a desert patent Mrs. Mackintosh had received, on the ground that she made a false statement upon final proof and on the ground that she fraudulently conspired with the Salina Stock Company to obtain title for the benefit of the company. The court declined to disturb findings by the Secretary that the evidence did not support either charge.

Nowhere did the Eighth Circuit, as petitioners suggest, hold that events happening after the filing of the initial application are irrelevant to the question whether the patent was lawfully issued. Indeed, the

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[5] When the Desert Land Act was first enacted speculators, land companies and cattlemen flagrantly violated it and similar Acts by employing dummy entrymen to acquire title to large areas. Gates, P. W., *History of Public Land Law Development*, pp. 638, *et seq.* (1968); Ganoe, J. T., "The Desert Land Act in Operation, 1877–1891" *XI Agricultural History*, 142, *et seq.*, April 1937. See, also, Hibbard, *A History of the Public Land Policies*, pp. 424–434 (1939). "In fact the Desert Land Act's widespread abuse leads to the belief that it was passed at the behest of large scale operators." Dunham, H. H., *Government Handout, A Study in the Administration of the Public Lands, 1875–1891*, p. 29 (1941). By the General Revision Act of March 3, 1891, 26 Stat. 1096–1097, and the Amendment of 1908, 35 Stat. 52, prohibiting assignments to corporations, Congress sought to eliminate these abuses of the Act.

entire discussion of the evidence in the *Mackintosh* opinion would have been unnecessary if the court had so held. The language petitioners quote from *Mackintosh* (Pet. 15), that there is " 'nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected,' " does not support their position. It is part of a larger statement (85 Fed. at 338) which reads:

> There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected, for the benefit of even a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation. In such case, if the patent be issued to her, she could transfer to whom she pleased. As said by Mr. Justice Brewer, in *U.S.* v. *Budd*, 144 U.S. 163, 12 Sup. Ct. 577:
>
> > "The act does not in any respect limit the dominion which the purchaser has over the land *after* its purchase from the government, or restrict in the slightest his power of alienation. * * * *If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied*" [emphasis added].

Thus, the court said that the Act did not restrict alienation after the "entry has been perfected" and the locator "complies with the requirements of the statute respecting irrigation" and "no one save the purchaser has any claim upon it" (85 Fed. at 338).

Under petitioners' interpretation of *Mackintosh*, during reclamation entrymen could surrender posses-

sion and control to a corporation and arrange to convey title to the corporation when they receive the patent so long as they avoid actually signing a contract to sell, enforceable under the statute of frauds. This view is not supported by that case or by any decision of this Court (see Pet. App. 150–151) and was properly rejected by the Court below.[6]

c. The court below properly concluded that " 'fraud or gross irregularity' in the original dismissal of the contest on a stipulated record which did not reveal material facts * * *" justified the Secretary's reopening of the administrative case (Pet. App. 152–153). So long as the Secretary, as guardian of the public lands, retains jurisdiction over the land, he possesses the power administratively to correct departmental actions. *West* v. *Standard Oil Company,* 278 U.S. 200, 210; *Knight* v. *United States Land Association,* 142 U.S. 161.

Once title in land has vested in a claimant under the public land laws as the result of the issuance of a patent (*Iron Silver Mining Co.* v. *Campbell,* 135 U.S. 286), the Secretary may not reconsider the matter administratively. Upon discovery of fraud, however, the United States is not precluded from challenging conveyances made in violation of the public land laws. Thus in *Causey* v. *United States,* 240 U.S. 399, this court sustained the right of the United States to vindicate the integrity of the Homestead Law by allow-

[6] It is also significant that *Mackintosh* was decided on the basis of the 1877 Desert Land Act prior to the 1891 and 1908 amendments which were designed to prevent abuses such as those at issue here.

ing judicial cancellation of a patent fraudulently procured by one who had falsely represented that he had not agreed to transfer the land to a third party. The court below, therefore, properly concluded that the Secretary was entitled to secure cancellation of patents which has been procured by fraud and suppression of material facts, especially here where there was no reliance by an innocent party (Pet. App. 154).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MEMORANDUM FOR THE PETITIONERS IN REPLY.

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MEMORANDUM FOR THE PETITIONERS IN REPLY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners herein have prayed for a Writ of Certiorari to review the decision of the Court below. In its opinion, the United States Court of Appeals for the Ninth Circuit departed radically from prior decisions by this Court, itself and by the Eighth Circuit. The

Ninth Circuit also departed radically from established principles of appellate review by briskly overturning the detailed findings of the District Court in favor of conclusions shockingly inconsonant with the evidentiary record compiled at trial. If left standing, this contrary decision will sanction the most arbitrary and capricious conduct by the Department of the Interior. Its distortion of established law will disrupt the efforts of future entrymen upon desert lands to the frustration of the manifest desire of Congress that millions of barren desert acres be made fruitful through irrigation. For all these reasons, Petitioners have sought certiorari.

The Government's Memorandum in Opposition utterly fails to come to grips with Petitioners' arguments. Instead, that Memorandum depicts as well-settled law a position supported in no other decision except the opinion of the Court below—a position "legislating" provisions into the Desert Lands Act of 1877* which Congress expressly excluded on several occasions. The Government's Memorandum characterizes as the mere "view" of Petitioners "properly rejected below" a history of decisions of this Court and of the Eighth and Ninth Circuits, all of which bound the discretion of the Department of the Interior to limits prescribed by statute [Gov't Memorandum 7].

The Government's arguments should be addressed to Congress and not to this Court. Those arguments are based on the Desert Lands Act of 1877 as the Government wishes it had been written; they are not based on the Act as it was enacted and thereafter interpreted. The Government claims for the Secretary of the Interior a roving commission and unfettered power—unguided

*19 Stat. 377, as amended, 43 U.S.C. 321, *et seq.*

by legislative standards, the Administrative Procedure Act, traditional notions of due process—and in disregard of the statute being administered. For all these reasons, Petitioners are compelled to make this reply.

I.

The Court of Appeals' Decision Conflicts With Long-Standing Authorities and Installs in the Desert Lands Act of 1877 Additional Requirements on Entrymen Never Adopted by Congress and Rejected by Courts.

In its opinion interpreting the requirements made upon persons wishing to enter and claim desert lands, the Court of Appeals for the Ninth Circuit *expressly* noted that its decision was in complete conflict with that of the Eighth Circuit in *United States v. Mackintosh*, 85 Fed. 333 (8th Cir. 1898) [See Pet. App. 148*].

The Government's Memorandum in Opposition resolutely ignores this portion of the Court's opinion and suggests there is no conflict between *Mackintosh* and that opinion. The Government's reasoning to that conclusion is specious; the conflict is polar, as Petitioners will demonstrate.

Under the Desert Lands Act of 1877, as amended, any citizen, but not a corporation, may enter and reclaim 320 acres of designated desert lands by filing a declaration of his intention to irrigate said lands within three years, an irrigation plan showing the water source, and paying a filing fee. The entryman's further tasks are specified in 43 U.S.C. 329:

> "At any time after filing the declaration, and within the period of four years thereafter, upon

*Petitioners' separately-bound Appendix of the decisions below, filed with the Petition for Writ of Certiorari.

making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to such officer of the additional sum of $1 per acre for said land, a patent shall issue therefor to the applicant . . ."

It is the argument of Petitioners and the Eighth Circuit in *United States v. Mackintosh,* 85 Fed. 333 (8th Cir. 1898), that the Government may impose *no additional* requirements on entryman beyond those catalogued in the Desert Lands Act. At the time of final proofs, of course, the Government may challenge the declarations of an entryman to assure compliance with the statute. Petitioners, notwithstanding the intimation of the Government's Memorandum, never argued that challenges to statutory compliance are not permitted or that events relevant thereto may not be inquired into at the time of final proofs. *Mackintosh* supports this view fully.

However, the Government may not go beyond the statute and may not require in final proofs that an entryman declare any executory understandings or contracts to sell his desert entry after receiving his patent. The Government displays no authorities for the converse of this proposition, and *Mackintosh* fully supports the position of Petitioners on this matter.

In *Mackintosh,* after issuing a patent to an entryman, the Government sought its cancellation for noncompliance with the Desert Lands Act and for an alleged conspiracy with a corporation to acquire lands

for the benefit of the corporation and thereafter transfer them to the corporation.

The Government asserted Mrs. Mackintosh failed to comply with the statute in three respects. The filing fee and purchase price were alleged to have been paid by the corporation, the amount of reclamation work performed was falsely declared to have been sufficient, and finally it was asserted that Mrs. Mackintosh had failed to reveal that from the time of initial entry she was the agent of a corporation. The District Court rejected all three assertions by the Government as unproved after a lengthy trial. The Eighth Circuit affirmed, after reviewing each claim and the evidence adduced at trial thereon.

The Government, however, was not satisfied merely with compliance with the statutory requirements. The Government alleged in novel fashion that Mrs. Mackintosh's patent should be cancelled because she had conspired with the corporation "in contravention of the spirit of the statute" (85 Fed. 333, at 338) before receiving her patent to transfer her lands as soon as they were acquired to the corporation. The Government insisted that Mrs. Mackintosh should have revealed her plans, later consummated, to sell the lands after patent to the corporation. Her failure to so declare was charged to be a misrepresentation in final proofs.

The Eighth Circuit rebuffed the Government's efforts to impose an additional requirement upon an entryman which Congress had not legislated, holding that:

> "In the search after fraud, the inquiry must be limited to such matters as the statute requires to be established in making the final proof." 85 Fed. 333, at 337.

The Court went on to explain there was no statutory foundation for the Government's demand for this additional disclosure at the time of final proofs:

> "There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected, for the benefit of even a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation. In such a case, if the patent be issued to her, she could transfer to whom she pleased. As said by Mr. Justice Brewer, in *United States v. Budd,* 144 U.S. 163, 12 S.Ct. 577:
>
> > 'The Act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. . . . If, when the title passes from the Government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the Act is satisfied.' " 85 Fed. 333, at 338.

In holding that the Government may not require an entryman to make additional declarations regarding executory arrangements to transfer desert lands after patent, the Eighth Circuit was deciding a question much more fundamental than superficially appears: The Eighth Circuit was placing the Department of the Interior on notice that the Desert Lands Act was to be observed in precise accord with its terms as prescribed by Congress; new requirements were not to be administratively engrafted thereon.

It is apparent from decisions following *Mackintosh* that public lands administrators frequently have sought to exercise powers not allotted them—and as frequently have been admonished by the appellate courts.

Thus, in *Adams v. Church*, 193 U.S. 510 (1904), a similar case to *Mackintosh* arising under the Timber Culture Act of 1878, the Supreme Court restrained the Department of the Interior from increasing the statutory requirements:

> ". . . [W]e find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest, to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law.
>
> "To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands not found in the statute or required by the policy of the law upon the subject." 193 U.S. 510, at 516-517.

Subsequently, the Supreme Court repeated these views of administrative authority, applying them to the Timber and Stone Act of 1878, as amended. In *Williamson v. United States*, 207 U.S. 425 (1908), the Court declared:

> ". . . [I]t cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at

> the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom." 207 U.S. 425, at 459-460.

The Supreme Court went on:

> ". . . [T]his power [to effectuate the provisions of the Timber and Stone Act by regulations] must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred." 207 U.S. 425, at 462.

Williamson was approved and discussed at length by the Supreme Court in *United States v. Biggs,* 211 U.S. 507 (1909), to the same effect.

The Eighth Circuit, twenty-one years after *Mackintosh,* re-emphasized its views. Citing *Adams* and *Williamson,* the Court in *United States v. Valley Land & Investment Co.,* 258 Fed. 93 (8th Cir. 1919), blocked the Department of the Interior from imposing its own requirements upon entrymen and commented:

> ". . . [A]nd as there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, he was under no obligation to make such an affidavit, and had full power to dispose ad interim of his claim, upon the final issue of patent, the motive of such applicant at the time of the final proof was irrelevant." 258 Fed. 93, at 102-103.

The Eighth Circuit continued:

> ". . . [T]herefore, the inquiry of the court could not extend beyond the good faith and the truth of the statements in the affidavit required by the provisions of the law of the entryman at the time of making his entry." 258 Fed. 93, at 103.

The force of *Mackintosh* lies, then, in its representative status. As a decision involving the Desert Lands Act in facts not dissimilar from those at bar, *Mackintosh* stands for all those decisions confining the Department of the Interior to the terms of the laws they are to administer, denying the Department any authority to impose further requirements upon entrymen. The Court below, however, would permit the Department to make additional requirements [Pet. App. 150-151].

The conflict between *Mackintosh* and the opinion of the Court below is not to be turned aside by a narrow reading of facts as the Government suggests, nor by the Government's statement that *Mackintosh* was decided prior to the 1891 and 1908 amendments to the Desert Lands Act [Gov't Memorandum 7, n.6]. *Mackintosh* was decided in 1898, sometime after the first amendments. The later amendments merely restrict the assignment of entries before patent; *Mackintosh* dealt with a quite different topic: arrangements for conveyance of lands after patent.

The Government's Memorandum has failed to address the conflict between circuits posed by *Mackintosh* and the decision below. It is appropriate to take note the decision below was also in conflict with prior decisions of the Ninth Circuit, none of which were even *mentioned* in the opinion below, despite extensive briefing by Petitioners.

In *United States v. Barber Lumber Co.*, 194 Fed. 24 (9th Cir. 1912), a decision construing the Timber and Stone Act, the Court noted:

> "Before entering upon a consideration of the legal conclusions to be drawn from the facts, it will be well to take our bearings in the law applicable thereto as we find them in a series of decisions of the Supreme Court. *United States v. Budd*, 144 U.S. 154; . . .; *Williamson v. United States*, 207 U.S. 425; *United States v. Biggs*, 211 U.S. 507." 194 Fed. 24, at 29.

The following year, the Ninth Circuit again construed the Timber and Stone Act precisely according to its terms in *United States v. Kettenbach*, 208 Fed. 209 (9th Cir. 1913):

> ". . . In these decisions, the law has become well settled that the act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation; that all that it denounces is a prior agreement, the acting for another in the purchase; . . . *United States v. Budd*, 144 U.S. 154; *Williamson v. United States*, 207 U.S. 425.
>
> "In the cases which we now have before us for decision, the testimony is very voluminous. A great portion of it relates to acts of the entrymen, and of the defendants, or some of them, at the time of making final proof, or prior to that time and subsequent to the making of the original application to purchase the land. *Under the decisions just referred to, this testimony was only admissible and can only be considered by*

this court in so far as it tends to establish the fraudulent purpose of the entrymen with respect to the land in controversy at the time of the original application." 208 Fed. 209, at 214. (Emphasis added).

In *Connor v. United States,* 214 Fed. 522 (9th Cir. 1914), the Ninth Circuit interpreted the Desert Lands Act, *as amended.* It approved the opinion of the Eighth Circuit in *Mackintosh* as an accurate statement of the law. Ironically the *Connor* opinion also quotes a decision by the Secretary of the Interior, rendered after *Mackintosh,* which quotes from *Mackintosh* approvingly. [Case of Alonzo B. Cole, 38 L.D. 420].

In light of the extensive support given by the Ninth Circuit in *Barber Lumber, Kettenbach* and *Connor* to the rationale and holding of *Mackintosh,* for the Ninth Circuit in the opinion below merely to "decline to follow" *Mackintosh,* without further comment on the Supreme Court decisions in *Adams, Williamson* and *Biggs,* and without mention of the previous Ninth Circuit decisions quoted herein, is a dismaying departure from *stare decisis* [See Pet. App. 148].

The Court below peered so intently at selected testimony from the trial record it lost sight of the forest for the trees. Its concentration on the Land Department's interpretation of the 1891 Desert Lands Act amendments, later approved in *United States v. Hammers,* 221 U.S. 220 (1911), led it to imagine that assignment of entries before patent was somehow involved in the case at bar [See Pet. App. 149-150].

The District Court found to the following effect:

> "The contractual arrangements between Hoodco Farms, Inc., the entrymen and Indian Hill

Irrigation Company, did not constitute assignments of the desert entries to Hoodco Farms, but rather constituted a legal and proper financing plan for the joint development of the entries." [Pet. App. 124].

The Court below makes no reference to the detailed testimony upon which that District Court finding was based.

As the Court below failed to recognize, it is not a part of the Desert Lands Act for the Secretary of the Interior to police "arrangements" that do not amount to "assignments." [Pet. App. 150-151]. "Assignments" are transfers of entire interests; financing "arrangements" are not. See, *e.g., United States v. Valley Land & Investment Co.*, 258 Fed. 93 (8th Cir. 1919).

The Court below assumed the existence of fraudulent conduct, disregarding completely the findings of fact of the District Court to the contrary [Pet. App. 116-125], thus disregarding the conclusion of the District Court that the Government had not met its burden of proof of showing fraud [Pet. App. 126-131], and disregarding settled law establishing the stringency of the Government's burden of proof.

In *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325 (1887), the Supreme Court held that testimony in actions to cancel patents must be "clear, unequivocal and convincing"; "it cannot be done upon a bare preponderance of the evidence which leaves the issue in doubt." 121 U.S. 325, at 381. The Court explained the policies underlying this stringency:

> "In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed be-

fore its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof." 121 U.S. 325, at 381.

Though the Court below displayed certainty in its decision to a degree possible only by selecting for exposition a minute aspect of the total trial testimony, such certainty does not harmonize with the District Court findings. The District Court conscientiously tried this complex action and received lengthy testimony.

Petitioners submit the findings of the District Court were entitled to far greater deference than was accorded below. This case is similar to *United States v. Valley Land & Investment Co.*, 258 Fed. 93, at 105 (8th Cir. 1919) wherein the Court stated:

> "Admitting that inferences might be drawn from some of the evidence, some of the facts and circumstances in the case, that would indicate an intent and purpose to violate this provision of the Pre-Emption Law, *the position of the trial court becomes especially important. After seeing personally the witnesses, observing their demeanor upon the witness stand, having an opportunity to judge the character and stability of the men, he finds:*
>
> *'These gentlemen impressed me as honest men, as substantial citizens. . . . The men did not hesitate to tell the whole story . . . I think it was an honest transaction.'"* (Emphasis added).

The Court below failed to consider the opportunities for assessing demeanor and credibility available to the District Court and unblinkingly presumed upon the adequacy of the record transmitted.

Most unsettling to Petitioners in the attitude of the Government throughout, an attitude not rejected by the Court below, is the Government's argument that it may cancel patents today, branding as "fraudulent" conduct which was wholly consonant with existing decisions when performed. Innocent behavior is twisted into sinister conduct, all without any awareness by Petitioners—or other entrymen on other desert lands. The Government refuses to recognize the law on which these—and doubtless many other—entrymen relied in investing millions of dollars of improvements.

For the Government in its Memorandum to fail to come to grips with the arguments of Petitioners but to rely instead upon a tortured and narrow understanding of *Mackintosh* is dismaying. For the Government to ignore the District Court's determination that it never met its heavy burden of proof of fraud and to insist such fraud was never in doubt is terrifying. Petitioners sought to conform to the Desert Lands Act as enacted and interpreted for eighty years—only now to find the rules of the game are being changed in the final inning.

II.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

November 19, 1973.

Respectfully submitted,

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